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Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY
HOOK PILOTS ASSOCIATION, A CORPORATION
AND UNITED NEW YORK SANDY HOOK PILOTS
ASSOCIATION, A CORPORATION, PETITIONERS,

vs.

ANNA HALECKI, ADMINISTRATRIX AD PROSE-
QUENDUM OF THE ESTATE OF WALTER
JOSEPH HALECKI, DECEASED, AND ANNA
HALECKI, ADMINISTRATRIX OF THE ESTATE
OF WALTER JOSEPH HALECKI, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1958
CERTIORARI GRANTED JUNE 9, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Case #24451

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of **Walter Joseph Halecki**, deceased, and **ANNA
HALECKI**, Administratrix of the Estate of **Walter Joseph
Halecki**, deceased, Plaintiff-Appellee,

v.

**UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION**, a corporation and **UNITED NEW YORK
SANDY HOOK PILOTS ASSOCIATION**, a corporation, Defen-
dants-Appellants.

Appendix to Appellants' Brief—Filed August 29, 1957

[fol. 1] **STATEMENT UNDER RULE 15(b)**

This action was commenced by the service of a summons and complaint filed August 21, 1953 (Record 529-537).

On September 17, 1953, an amended summons and complaint was served and filed (Record 540-548).

Thereafter on December 1, 1953, an answer was served and filed by defendants-appellants (Record 551-555).

Trial was held before Hon. Edward Weinfeld, District Judge, and a jury, in the United States District Court for the Southern District of New York, on December 28, 1956, January 2, 3, 4, 1957. Verdict was returned by the jury for the plaintiff-appellee and against the defendants-appellants, in the sum of \$62,500 for pecuniary loss to the widow and dependent children, and in the amount of \$2,500 for conscious pain and suffering to the decedent, in the total amount of \$65,000 (Record 1-528).

At the conclusion of the plaintiff's case, the defendants moved for dismissal of the action (Record 334), and for a directed verdict (Record 335). Thereafter, at the con-

clusion of the defendants' case the defendants renewed their motion for a directed verdict (Record 425). These motions were denied by the Court. After verdict, the defendants moved to set aside the verdict and further moved for judgment notwithstanding the verdict and in the alternative a motion for a new trial. These motions were denied by the Court (Record 528).

Notice of Appeal from the order denying the defendants' motion for a new trial; from the order denying defendants' motion for judgment notwithstanding the verdict; and from the verdict of the jury and the final judgment entered thereon was served and filed on January 29, 1957.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

ANNA HALECKI, the plaintiff, being first duly sworn, testified as follows:

Cross examination.

By Mr. Mahoney:

Q. Mrs. Halecki, at the present time you have an action pending in New Jersey?

Mr. Baker: Just a moment. I object to that. I think that should be subject to the Court's ruling before the question is put.

The Court: Let me see the papers that you refer to.

For the time being I am going to sustain the objection. This may be independent grounds of liability.

Mr. Mahoney: Exception.

DONALD DOIDGE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

By Mr. Baker:

Q. Mr. Doidge, what is your present occupation?

A. Electrician.

Q. How long have you been an electrician?

A. About 30 years.

Q. In September of 1951 by whom were you employed?

A. By the K & S Electric Company.

Q. Who is the boss of that company?

A. Mr. George Kuntz.

Q. Now, what was your job with them at that time?

What position did you hold?

A. I was the shop foreman.

.

[fol. 3] Q. How long had you been working with Walter Halecki?

A. I think it was around six years.

.

Q. Now, with reference to the work on this vessel, was it the New Jersey, the name of the vessel?

A. That is right.

Q. Where was that vessel docked?

A. In Rodermond Shipyards, foot of Henderson Street, Jersey City.

.

Q. Did you know at that time that the carbon tetrachloride was dangerous?

A. Yes, sir.

Q. And you had known it for some time before that date?

A. That is right.

Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time?

A. I don't think so. We just take those things for granted. We knew what it was all about.

.

Q. What preparations did you make? Will you tell us that?

4
A. Well, on the Friday afternoon I brought extra air hoses aboard and also brought an exhaust blower from the storeroom.

Q. Now, these air hoses, whose equipment was that?

A. They belong to Rodermond Industries.

Q. And the blower?

A. That was also Rodermond Industries.

Q. With reference to the air hoses, will you tell us what they were for? Will you describe that to this Court and jury.

A. Well, the air hoses were approximately 50 foot in length and they were attached to the pipeline along the dock and brought down into the engine room.

Q. And what were those air hoses used for? Will you tell us.

A. Well, we used it to attach to the spray gun for the carbon tetrachloride, and the other one we used as an exhaust underneath the generator, just turn it on to blow the [fol. 4] fumes of carbon tetrachloride away from the generator as you were spraying.

Q. So that there were two air hoses? One was used and applied so that you could spray the carbon tetrachloride?

A. That is right.

Q. And the other air hose you used to blow air in the face of this man?

A. Away from his face.

Q. You were telling us about the two air hoses which you brought for the vessel and the uses which were made of these air hoses. What else did you bring aboard the vessel on the preceding day, namely, a Friday, before September 29, 1951?

A. Besides the air hoses I took a high compression blower on board.

Q. And this blower, I understand, was a blower which belonged to Rodermond Industries.

A. That's right.

Q. And you brought it aboard the vessel that preceding Friday?

A. Yes, sir.

Q. Tell us what you did, just how you placed it in position and where.

A. When you go down to the engine room, there is a side door on the deck side and then there is a catwalk around the top of the engine room, with a ladder going down into the lower engine room. The blower was placed on the corner of the ladder, blowing so that it would blow out of the open doorway. One end was struck down into the engine room and the other one facing up, to blow out towards the top of the doorway.

Q. Did this blower blow air in or exhaust air out?

A. It blows both ways but we had it on the exhaust position.

Q. Taking it out?

A. Taking foul air out.

Q. Could you give us the dimensions of that engine room?

A. I never measured it but I would say approximately [fol. 5] 40 feet by 30 feet, maybe—40 feet long, fore and aft, 30 feet wide, approximately.

Q. And how high would you say that engine room was from floor to ceiling?

A. From the lower engine room?

Q. Well, that engine room that is involved here.

A. Yes.

Q. From the floor to the ceiling, how high is it?

A. I would say approximately 18 feet.

Q. What other things can you tell us with reference to that room, with (sic) reference to its ventilation—say the doors? Were there doors to the room?

A. Well, there were as I said before. There was one blower that I placed alongside of the door going into the open deck, on the port side, and then there was another door that went up into the galley and then out onto the open deck from there.

Q. So it had two doors, this particular one?

A. Yes, but one was a little bit of a blind alley, the one

going through the galley and out then; out to the open deck again.

Q. Was that kept closed?

A. No, both kept open.

Q. Both kept open?

A. Yes, sir.

Q. How large were these doors, could you tell us?

A. A regular door. I would say about 3 foot.

Q. Three foot what? Wide?

A. Yes.

Q. And how tall?

A. Oh, about seven foot.

Q. Now, preparatory to doing the work that you are required to do, that you mentioned was on a Saturday morning, September 29, 1951, was it necessary for you to purchase any materials or anything?

A. Yes, we had to get the carbon tetrachloride.

Q. Why did you purchase the carbon tetrachloride?

A. For use on the ship.

Q. And why did you select carbon tetrachloride?

A. Because the specifications called for it.

[fol. 6] Q. How much of it did you purchase?

A. I got ten gallons of it.

Q. Can you tell us why you selected ten gallons?

A. Well, we just figured that it would take five gallons per generator to do a thorough job.

Q. And you took ten gallons?

A. Yes, sir.

Q. When did you bring that aboard the vessel?

A. I think I bought (sic) it aboard Saturday morning. I brought it on a truck with me.

Q. Was this purchased by you on behalf of K. & S. Electrical Company, your employer?

A. That is right.

Q. You brought it aboard the vessel, you think, the following morning?

A. Saturday morning, yes, sir.

Q. How much of that was used during the day?

A. I think it was around eight gallons.

Q. What did you do that morning? The first thing you did.

A. I went to see, checked to see if the air compressor had been turned on, and Walter in the meantime attached the hoses to the pipe along the street and put the end of it down in the engine room where it was going to be used.

Q. Where did the particular juice come from for the connection of these air hoses?

A. Well, that came from the standpipe along the street. There was an airpipe running along the street.

Q. From the dock?

A. Yes.

Q. Who turned that on, if you know?

A. We had made arrangements with Rodermond for the engineer to start the compressors up on Saturday morning.

Q. What engineer was that? Rodermond's engineer?

A. Rodermond's engineer, yes.

Q. That is with reference to air hoses. Now, what else was done? What was the next thing done?

[fol. 7] A. We got all ventilators going that we had placed aboard, that is, the blower.

Q. When you say all the ventilators, be specific. What do you mean?

A. First of all, I had to start the shore generators.

The Court: The what?

The Witness: The shore generators.

The Court: What was the function of the shore generators?

The Witness: Well, the ship's generators were dead. Therefore, to have power and light on board we have a generator on shore with cables running to the main board of the ship and attached there so that we can throw any switch and operate any part of the ship while it is in the process of repair.

Q. Now, this ship's generator which you say was dead, that was dead on this particular day, is that right?

A. No, sir.

Q. It was dead before that?

A. The generators were not running while it is in repairs.

Q. Was it dead, this generator, during the entire time that the vessel was there from that Monday morning on?

A. That is correct.

Q. So you got your power then from shore?

A. That is right.

Q. Then you turned on this power or the power was turned on, as you described it? Tell us what it did.

A. Well, it energizes the main switchboard on the boat, and that, in turn, we throw the switch and start the blower motors for the ship's ventilators.

Q. So it starts the ship's blowers, the ship's own ventilating system that morning?

A. Yes.

Q. What time did that start?

A. 8:30.

Q. Did the ship's generators which you started, did they [fol. 8] keep going during the entire time that you did this work that day?

A. You mean the ship's blower?

The Court: He said the ship's generators would not operate.

Q. I mean the ship's ventilating system.

A. Yes.

Q. That kept going during the entire day during the time you did this work?

A. Yes.

The Court: Does that take care of both intake and exhaust?

The Witness: Yes.

Q. These blowers that you had, that is part of the ship's blowers, was that all blowing air in?

A. I think so, sir.

Q. But the portable, the one you placed in there, you described, and brought up to shore, that was the exhaust that took the fumes out?

A. That is right.

Q. The blower which you installed, was that kept going all the time from the time you started doing your work until the time you finished your work?

A. It was.

Q. Was there anything else with reference to the ventilation that you kept going during that entire time?

A. Well, the extra air hose that I had was tied down to the base of the generator and turned on, not full, of course, but partly turned on allowing air to come out that way to circulate, and then, of course, we had the oscillating fan which was also going.

Q. And they all kept going during the entire time you did your work?

A. Yes, sir.

Q. Did you bring anything else on the vessel for the work to be done that day for the cleaning of the generators with the carbon tetrachloride?

A. Yes, I brought three gas masks down there on Saturday morning.

[fol. 9] Q. And they belong to your own firm?

A. K & S Electric, yes.

Q. And you brought that aboard the vessel that Saturday morning?

A. Yes, sir.

Q. Did each of you use a gas mask?

A. Yes, sir.

Q. And who was on the vessel other than you and Mr. Halecki, that Saturday morning?

A. There was only a watchman.

Q. A watchman for the vessel?

A. That's right.

Q. Will you tell us the procedure that you pursued when you started this spraying? How did you do that?

A. Well, we have the air and everything on. The spray gun is attached to one of the air hoses. The spray gun itself has a suction hose that went down into the can of carbon tetrachloride, forming a suction and spraying into the generator coils and the armature.

Q. Tell us just what went on there?

A. Well, the hose from the spray gun goes right into the can and wherever you move, there was only about three foot of hose on it, and whenever you moved you had to move the can with it. So we started spraying, as I said, about nine o'clock, maybe, and we sprayed for about maybe ten, fifteen minutes and then we would go up on deck or maybe up in the messroom.

Q. During the period of time that he was doing the spraying, during that day, did he wear a gas mask?

A. Oh, yes.

Q. He wore it at all times?

A. Yes.

Q. When he left the vessel—I am talking about Mr. Halecki—did he say anything to you with reference to any [fol. 10] thing concerning his condition at that time?

A. The only thing, when I was leaving him, we were up on the street, and the only thing he said to me was that he had a peculiar taste in his mouth, but that is the only thing that was said.

(Cross examination.

By Mr. Mahoney:

Q. You have identified for Mr. Baker certain documents that were described as repair lists and things of that nature. Were they given to you by Rodermond employees, Mr. Doidge?

A. As I said before, I am not sure. They could have been or it could have been handed to me by my boss.

Q. At any rate, they were not given to you by any Pilots Association's members.

A. Oh, no, no.

Q. Do you know who recommended those specifications?

A. Rodermond Industries prepares them.

Q. Your orders for coming aboard the Pilot boat to do

this particular work from Mr. Kuntz, your own employer, isn't that right?

A. That is correct.

Q. You were not given any particular orders as to the time when the work was to be done, were you?

A. No, sir.

Q. I believe you told me at one time that the time schedule was up to yourself, isn't that right?

A. That is correct.

Q. Before you worked on the Pilot boat in New Jersey, I believe you testified that you had used the same substance many times before, is that right?

A. Oh, yes.

Q. I believe you have stated before today that using carbon tetrachloride to clean generators was the customary method before September of 1951?

A. Yes.

[fol. 11] Q. And was a method with which you were completely familiar, is that right?

A. Oh, yes.

Q. You had done this job in connection with or in the company of Mr. Halecki before this occasion?

A. That is true.

Q. And as far as you know, he was familiar with that substance too, isn't that right?

A. Yes.

Q. And I believe that on some occasions, at least, you had used carbon tetrachloride, even when it was not so specified, is that true?

A. That is possible.

Q. You are an electrician by trade, Mr. Doidge, is that right?

A. Yes.

Q. And not all of your work is done on ships, is that true?

A. That is true.

Q. And I suppose you have cleaned generators and factories and buildings and other places on shore as well as

on ships? And have you ever used carbon tetrachloride in places like that?

A. Yes.

Q. You yourself were in charge of this work, is that correct, Mr. Doidge?

A. That's correct.

Q. And on a prior day, a Friday, when you actually did the job, this equipment was assembled by you and the decedent, is that right?

A. Yes.

Q. And it was under your direction, is that right?

A. Yes.

Q. And I think you told us you took air hoses aboard the ship. Will you tell us once again who owned the air hoses?

A. The air hoses belonged to Rodermond Industries.

Q. And you took blowers and assembled them in certain places in the engine room?

A. We took one blower aboard.

Q. And that belonged to whom?

A. Rodermond Industries.

Q. And you assembled that yourself?

A. We just had to tie it and plug it in.

[fol. 12] Q. Did Mr. Halecki assist you in doing this work?

A. He did.

Q. As far as you know, these air hoses were not defective in any way?

A. Oh, no.

Q. There was no substance that leaked out of them or anything like that?

A. No.

Q. Where did the power come from that operated this equipment?

A. The power came from the shore generator.

Q. And the pilot boat New Jersey was a dead ship; is that right?

A. You might say partly because the power from the generator ashore was attached to the ship's switchboard.

Q. At any rate there was no power originating from the ship itself?

A. No, no.

Q. And that had been the case all week, I think you told us.

A. That's right.

Q. The generator that did actually power this equipment was on the shore; is that right?

A. Yes.

Q. And who owned that, please?

A. Rodermond Industries.

Q. Had it been operating all right?

A. Oh, yes.

Q. And I think you yourself started, is that correct?

A. Yes.

Q. And it was operating all right then?

A. That's right.

Q. This same generator was used to give power to the vessel's own equipment; is that correct?

A. Yes.

Q. And by that term "vessel's own equipment", do you understand that we are referring to the equipment that was part of the ship itself?

A. Yes.

Q. As distinguished from anything you had brought aboard.

A. That's right.

Q. And as long as you worked on the ship, that ventilating equipment was operating properly, was it not?

A. Yes, sir.

[fol. 13] Q. Now there is no doubt in your mind that all during the time of the work, the blowers were blowing air properly and the entire apparatus was operating properly, is that correct?

A. That's right.

Q. And when you started to work that morning were you satisfied in your own opinion that this was adequate ventilation for the men to work with carbon tetrachloride?

A. Well, sir, I am not an engineer but I was satisfied it was sufficient.

Q. You were satisfied it was sufficient?

A. That's right.

• • • • •

Q. I think you told us that there are ducts leading from the engine room to the open air above?

A. On the ship's ventilating system?

Q. Yes.

A. That's right.

Q. And these were blowers?

A. Yes, powered by each one.

Q. And they operated by an electric motor?

A. Yes.

Q. Do you know the horsepower in these electric blowers?

A. Not now I don't.

Q. Did you take notice of it at that time as an electrician?

A. Yes.

Q. Was it your opinion at that time that this motor was adequate for this purpose?

A. As far as I could see, yes.

Q. Did you have occasion, when you were in the engine room, to stand under these ducts and feel the air come in?

A. You could feel it all over.

Q. There was no question in your mind that there was fresh air coming in through these ducts, is that right?

A. That was blowing in, right.

• • • • •

Q. This carbon tetrachloride is a solvent, isn't it, to dissolve grease?

A. Yes.

Q. Can you tell us just briefly how a man using it operates? It is sprayed on by this air gun that you told us [fol. 14] about?

A. No, it is something like a paint spray gun.

Q. And it forces the substance onto the metal surface of the generator, is that correct?

A. Well, into the coils.

Q. And what happens?

A. The coils on the armature.

Q. And what happens then?

A. Well, it just penetrates in there and washes the grease and foreign particles out of there.

Q. There wasn't anybody else inspecting your work on the day in question, was there?

A. No, sir.

Q. This watchman you told us about—he had nothing to do with the work, did he?

A. No, sir.

Q. And nobody connected with the Pilots Association—and by that I mean the chief engineer or anybody else—they didn't direct you as to how you assemble these various pieces of equipment, did they?

A. No.

Q. That was all up to yourself; is that right?

A. That's right.

Q. And as far as you know, you assembled it all properly?

A. That's right.

Q. And as far as you know, you assembled it properly. Were any complaints made to you by the decedent during the day about the way this equipment was operated?

A. Not during the day, no.

Q. Did he ever make any complaints about how the things were set up or how they operated?

A. Oh, no, no.

Q. And I think you told us that this blower was equipped by yourself to suck air out, to exhaust the air; is that the idea?

A. That's right.

Q. Was that working all right?

A. Oh, yes.

Q. Do you feel the power taking the air out?

A. I sure do.

Q. In addition to these doors that you mentioned, wasn't [fol. 15] it a fact that there were skylights or ventilators overhead that led right out to the open air?

A. Yes.

Q. And were they open during the day?

A. Yes, they were open about six inches to a foot.

Q. Just one more question, Mr. Doidge. Is it your opinion that the ventilation on the boat was adequate on the day you worked there?

A. As far as I am concerned, it was, at that time, anyway.

DONALD CHRISTIE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Christie, what is your position?

A. Personnel manager.

Q. And that is with what company?

A. Rodermond Industries.

Q. With reference to any of this work that is listed in these last two exhibits—was any of it subcontracted out by the Rodermond Industries to another company, if you know?

A. I believe so.

Q. Was the electrical work subcontracted out, as far as you know?

A. Yes. We don't have any electrical workers.

Q. You don't have electrical workers. So that you subcontracted it?

A. Yes.

Q. And to what company did you subcontract it? Can you find that out from your records?

(Witness examines)

A. K & S Electrical Company.

Q. Do you know (sic) if you have a written contract with [fol. 16] the K & S Electrical Company?

A. That I don't know. That would be in the office.

Mr. Baker: That's all.

Cross examination.

By Mr. Mahoney:

Q. Mr. Christie, were you employed by Rodermond in 1951?

A. Yes.

Q. Do you have any direct knowledge of this transaction with the Pilots Association?

A. None at all.

Q. No knowledge of your own, is that right?

A. No.

Q. These various exhibits which you have identified were all prepared by Rodermond, were they not?

A. The copies I have, yes.

ANGELO GNASSI, called as a witness on behalf of plaintiff, being first duly sworn testified as follows:

Direct examination.

By Mr. Baker:

Q. Dr. Gnassi, what are you connected with at the present time?

A. Jersey City Medical Center.

Q. And what is your position with the Jersey City Medical Center?

A. Chief pathologist.

Q. Doctor, looking at these hospital records which are now offered in evidence as Exhibit 16, would you first read to this jury the history that appears upon his admission. First, what is the date of his admission, according to the hospital records?

A. 10/2/51.

Q. What is the history as shown on the admission sheet, Doctor?

A. "Chief complaints: Vomiting three days. Patient was spraying generator with carbon tetrachloride on Satur-

day, three days"—then there is an abbreviation "PTA"—and I don't know the significance of it.

[fol. 17] "Felt nauseous that night. On the next day patient had onset of vomiting which still persists. Patient cannot hold anything on his stomach and has a loss of appetite. Patient had headache for two and a half to three days. No dizziness. Patient has been having diarrhea since three days ago; average bowel movements, every half hour, loose, watery; no blood, no abdominal pain; cough since onset of vomiting; non-productive, irritated all over from violent vomiting; oliguria," which means suppression of urine, "one day. Patient has been drinking one-half pint of whiskey a day for five months."

That's the history.

ROBERT P. GAINES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where is your office located?

A. In the City of Bayonne.

Q. I called you Dr. Gaines. Am I wrong? Is it Mr. Gaines?

A. Well, we have a PHD in chemistry. The title really does not carry much weight.

Q. Would you tell us a little more about that. What do you mean by 50 to 100 parts per million? How is that figured, doctor?

A. It is very simple. One milligram per liter, or it would be one per million. In other words, your million is your volume, and of that, one part, grains per gallon would be almost approximately the same. That is, one part per gallon would be analogous to one part per million. So work was started in that field, and it was found that in order to dilute a volume down to a safe concentration of, we will say, 100 parts per million, they took one pound of carbon tetrachloride and they found that in order to re-

duce the content of the room with the one pound of carbon [fol. 18] tetrachloride in it down to 100 parts per million, they had to add 225,000 cubic feet per minute in order to get that solution down to the safe limit. That was too extensive an operation, so they worked on ventilation, and then it was found that the most efficient means to remove 850 cubic feet per minute, so today ventilation of a room where carbon tetrachloride vapors are used extensively in industry can be made very safe without much trouble merely by ventilation, and it should be added, in fairness to all, that the ventilation should be and must be from the bottom, that is, from the floor level, because the vapors are very heavy and do concentrate there.

Q. Now, Doctor, with reference to the use of, say, 8 gallons of carbon tetrachloride, and its use by a man in the spraying of carbon tetrachloride in an engine room for a period of from about 9 o'clock in the morning until about 3 or 3:30 in the afternoon, a period of anywhere from 5 to 6 hours, could you calculate for us the approximate concentration of carbon tetrachloride?

The Court: Wouldn't you want to give him the size of the area in which he worked? Don't you need that?

Q. I will ask you that, yes. Now, the size of the area was an engine room which was 40 feet long, 30 feet wide, the approximate area, and it was 18 feet high.

Now, the area contained a number of engines similar to those shown in the photographs which are marked in evidence, which I will show to you.

I show you Exhibit 5, Exhibit 9, Exhibit 10, Exhibit 11, Exhibit 12, Exhibit 13 and Exhibit 14.

Now, on those photographs the letter D means the ducts, and the letter O means the openings.

[fol. 19] The openings were all in the ventilation system of the vessel in the ceiling throughout the various parts of the ceiling, and the ventilation was in the bringing in of the air into the particular room.

In addition, photograph B shows the openings outside of the ducts, the transom openings. In addition, the man was working in a room under the following additional

conditions. There was a blower which was attached and brought into the room to exhaust the air from the room at a distance of about seven or eight feet above the engine floor.

There was also a fan to blow some of the fumes away from his face, which was going. There were also two doors. I think they show in some of those photographs, and they were elevated above the floor, I think a distance of six or seven feet, and he also wore a gas mask of the Army surplus cannister type. During the course of the work he wore that type of gas mask. And, in the cleaning of generators there were two air hoses one of which was used to spray the carbon tetrachloride and the other air hose was used to blow the fumes from the vicinity of his face.

He used, during the course of that day, about 8 gallons, originally brought on 10 gallons in two 5-gallon cans. They used up 8 gallons. The 5-gallon can was kept on the floor of the engine room, and the air hoses were in that can and going to the spray.

They worked in the following manner: he would spray for about 15 minutes and then stop the spraying and go off on the engine deck or elsewhere. He was away from the spraying work for about 15 minutes.

Taking all those facts into consideration, Doctor, could you calculate or reasonably estimate the concentration of carbon tetrachloride that was present under such circumstances?

Now, if you need time, Doctor, I think we are close to the noon hour and—

A. Rather than needing time, Mr. Attorney, I would [fol. 20] much rather be elucidated on a few phases here.

Q. All right.

A. In the first place, the volume which you have given me, 40 by 30 by 18—is that exclusive of the space occupied by these numerous ducts and staircases, and motors, and so forth, or does that include the displaced air?

Q. No. That is the entire area.

A. That is the area. Therefore, considerable air will be displaced within the area which you had given us the dimensions of by the equipment.

Q. That's right.

A. Well, sir, I am not acquainted with this ship. I don't know a thing about it. Therefore I would like to be guided as to whether it is 50 per cent displacement of the ship, or what. I mean, that is a factor to be considered.

Q. Well, would the photographs showing the amount of engines, and so forth, indicate approximately—

A. Sir, I cannot, under oath, give a precise figure unless we agree somewhere that there is a certain amount of air displaced by this machinery. If I judge about 50 per cent, I don't know whether that is fact or just an estimate, but I hope that the Court and jury bear with me because what I am trying to do is, if the dimensions of this room are so much, it has a certain volume, but if we are going to stack extensive bulky furniture in here, we are going to displace a lot of air. I think that is an important factor.

Mr. Baker: Could we have a recess at this time, your Honor, so that I can—

The Court: I will give you the requested recess, but you don't have any information in this record so far on that. You cannot supply that information to him at the lunch hour because it is not in the record.

[fol. 21] Mr. Baker: No, we haven't got that information, your Honor; I agree.

The Court: You can give him no information during the lunch hour on that subject.

Mr. Baker: I can't give it to him because I haven't got such information, your Honor.

The Court: Well, it is a few minutes to one anyway, so we will take our lunch hour recess and resume at 2:15.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

ROBERT P. GAINES, resumed.

Direct examination.

By Mr. Baker (continued):

Q. Dr. Gaines, before the noon recess, I propounded a question to you. The measurements of the room, the engine room, which I gave you at that time were the approximate dimensions which were testified to by a person who was working with the deceased who stated that in accordance with his (sic) opinion, the engine room was 40 feet long by 30 foot wide by 18 feet high.

Considering that as the dimensions, only for the purpose of giving us your initial calculation, and without figuring at all anything in the room whatsoever, but just for the purpose of the first calculation; could you tell us what your calculation would show as to the concentration of carbon tetrachloride?

Mr. Mahoney: Objection, your Honor, in view of the witness's statement in the earlier session, that he would have [fol. 22] to have the approximate area of the machines in the room. I object to any answer based on this hypothetical question.

The Court: Can you give an answer?

The Witness: Yes, I can. Assuming there was no displacements and specifically, on those dimensions of 40 foot by 30 foot by 18 foot, I can give an answer of 21,600 cubic foot of air.

The Court: 21 what?

The Witness: 21,600 cubic feet of air which I converted to liters, 395,712 liters. Then, assuming a standard temperature of 25 degrees Centigrade in 760 millimeters pressure—

The Court: I am going to interrupt now. There is no evidence of temperature, is there? How did we get into that?

Q. Well, without calculating the temperature, can you give it to us?

The Court: Is it requisite that you have the temperature?

A. What I have done here, your Honor, is take what we call a standard temperature of atmospheric pressure. The variation in each case would be small. That is, we are dealing with the vapor stage and as temperature increases, the vapor would be increased. So for standard figures I assume what we call standard conditions, 25 degrees Centigrade, which is the average all-year-round temperature.

Mr. Mahoney: Your Honor, I object to any answer based on facts not in the record.

The Court: I sustain the objection.

Q. Without calculating the temperature at this time—we will calculate the temperature next—will you continue [fol. 23] your calculations?

A. Well, I came to the figure of 20,000 parts per million.

Q. And what is meant by that, 20,000 parts per million? Is that concentration of carbon tetrachloride?

A. That is the concentration of carbon tetrachloride in the room.

Q. On the basis of the use of—

A. 40 by 30 by 18.

Q. On the basis of the use of how much tetrachloride over what period?

A. Six hours, eight gallons.

Q. Now with reference to the temperature, what effect would that have on the calculation you have made of 20,000 PPM—in other words higher or lower temperature?

A. Well, as your temperature increases, your volatility increases, thereby increasing the concentration.

Q. And as the temperature gets lower?

A. The volatilization would be decreased.

Q. Could you tell us how much of a variance there would be between a low temperature and a high temperature, as far as those figures are concerned, if there is any variance?

A. Very little variation.

Q. Very little?

A. Very little, until you get down to the freezing point.

Q. Now Doctor, this is based upon this room without any displacement of any of the engines, or of any parts within the room, is that right?

Mr. Mahoney: Pardon me, Mr. Baker. I must object to any further hypothetical question and answer until the witness has clarified the effect of barometric pressure which apparently was a part of his calculation, and which is not in the record.

The Court: Did you refer to barometric pressure?

The Witness: Yes. 760 millimeters standard barometric pressure. We are dealing with a vapor and two things, two factors that affect vapor are atmospheric pressure and [fol. 24] temperature. That is Charles and Boyle's Laws. As the pressure goes up, the volume goes down. As the temperature goes up, the volume will increase. And since we are dealing with a vapor, atmospheric conditions are to be considered, so, in order to be on the safe side in this hypothetical question I have assumed the ideal average atmospheric pressure and temperature for our latitude and longitude in coming to this calculation.

Q. And what is it that you assumed?

A. I used 25 degrees Centigrade and 760 millimeter pressure.

Q. If there is any variation in that, what effect would it have on your final outcome of 20,000 PPM?

A. It would have very little effect on that huge volume.

Q. And the allowable safe concentration you have indicated before is a figure of less than a hundred PPM; is that correct?

A. By personal choice the 75 parts per million is my own, but the MAC choice is 100.

Q. So that the figure you have of 20,000 is 200 times the allowable safe concentration?

A. Yes.

Mr. Mahoney: In view of the witness's statement I repeat my objection, your Honor. He has assumed facts not in evidence.

The Court: Well, he has also said that the temperature and the barometric pressure would make very little dif-

ference in the end result in that volume. In view of that statement, I will allow it to stand.

Mr. Mahoney? Exception.

Q. Now, Doctor, we have indicated to you that in accordance with the evidence submitted here, and in accordance with the photographs, there was a ventilation [fol. 25] system by ducts in the ceiling of this engine room in which air was being brought in to this engine room. What effect would that have upon the concentration of carbon tetrachloride in that room?

A. That was covered indirectly in my introductory remarks this morning when I spoke about dilution. Introducing air from the upper level would act as a dilution of the air in the room. We had established on many occasions that you would have to bring in 225,000 cubic feet per minute to bring a concentration down to the safe level.

Now, the answer to your question, sir, would be, A, the effect would be that of dilution. Now, how much dilution, I would have to know how much air is being brought in.

Q. In addition to that, there was a blower which exhausted from the room, and this blower was located about seven or eight foot above the floor of this engine room?

A. That would have some effect. How much effect, I don't know. What is the capacity of this blower? How many cubic feet per minute is this blower taking out of the chamber? I would have to know that. I will say that it will have some effect.

Q. Would it be sufficient, with the dimensions and the information that has been given to you concerning the amount of carbon tetrachloride which was put into this room during that period of time, would it have sufficient effect to reduce this concentration to a safe concentration?

A. In order to reduce it to a safe concentration, sir, you would have to remove 850 cubic feet of air per minute. If your exhaust fan or blower removes that amount of air, and that is quite a bit of air, then you are having a safe condition, but if it is doing anything less than that, if you

are removing anything less than that, you are having no effect at all, or very little, if any.

[fol. 26] Q. In what areas, in what particular places and areas is the use of carbon tetrachloride dangerous?

A. Well, the first prerequisite is ventilation, adequate ventilation, and if you conquer that, why, then it is all right. It has been for many years a household preparation.

Cross examination.

By Mr. Mahoney:

Q. Doctor, you testified to a calculation that you had made based on certain factors called to your attention by Mr. Baker, and please correct me if my understanding of it is improper. You were given certain dimensions which permitted you to calculate the area of this compartment, is that correct?

A. That is correct.

Q. And you were also given the fact that a certain amount of carbon tetrachloride had been used up over a certain period of time, is that correct?

A. That is correct.

Q. And based on those two factors you were able to calculate the concentration that was present in that compartment on the day in question?

A. The average concentration.

Q. The average concentration over a period of six or seven hours, or whatever it was?

A. Six hours.

Q. Your calculations of so many parts per million average concentration did not take into consideration, I assume, any types of ventilation that were present at that time, is that correct.

A. That also is correct.

Q. So then the figure which you gave—incidentally, would you remind (sic) repeating the concentration which you arrived at?

A. 20,000 parts per million.

Q. Per million. That figure does not reflect the exposure of an individual, does it?

A. That figure represents the concentration of the average—the average concentration of carbon tetrachloride in a [fol. 27] room of that size, and that assumed temperature and at the most frequently used pressure. Exposure, according to accepted figures—exposure from one-half to one hour is dangerous.

Q. Doctor, what I mean is this. You gave a figure which represents concentration. Then you told us that exposure depends upon extrinsic factors, is that right—the types of protection available, the amount of ventilation, and things of that nature? Is that a fair statement?

A. No, I would say that exposure is as it indicates, exposure. Now how much danger or what damage may have resulted from that exposure—then, sir, that depends upon whatever protective measure may have been introduced, whatever there is, such as ventilation or protective clothing, and so forth.

Q. No, Doctor, I am merely asking you to comment on my understanding of your testimony. Would it be fair to state that the amount that penetrates to the individual could only be determined when you take into consideration such safeguards as ventilation, fans, doors, gas masks and so forth?

A. Yes.

Q. Doctor, I ask you, would it be fair for me to interpret the situation in this manner: that a certain percentage of this 20,000 parts per million would be diverted from the individual by the various safeguards that may or may not exist in a given case?

A. Yes. The individual that is exposed is breathing. How much he breathes in will depend upon the protective measurements which you have taken.

Q. * * * Concentration, is it not so, represents the amount of the substance present at a particular time?

A. Yes.

[fol. 28] Q. Exposure could be defined as the amount that penetrates to the individual himself, is that right?

A. That's correct.

Q. Thank you, Doctor. That is my only problem. Now you were never aboard the boat in question, were you?

A. No, I wasn't.

Q. And you had no other knowledge of the circumstances other than those posed to you by counsel, is that right, sir?

A. That's right.

Q. Do you know, for example, the power of the motors which operated the blower system in the engine room?

A. No, I do not.

Q. Would that be an important factor in determining their efficiency?

A. Yes, that would be. In fact, I raised that question.

Q. Do you know the horsepower of the motors in the exhaust system which was designed to draw vapor from the compartment?

A. No.

Q. Would that be an important factor in determining whether or not they were adequate?

A. Yes.

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Q. Would it not be true that the horsepower of the motor which operated this portable exhaust would have an important effect on its adequacy?

A. The horsepower of the motor?

Q. That's correct.

A. Was this blower directed (sic) connected to the armature of the motor?

Q. I have no idea, Doctor.

A. Well, sir, there again you have a transmission problem.

Q. Well, this is a factor which you would have to know in order to determine its adequacy, is that not correct?

A. Yes.

Q. And you do not have that information, do you?

A. No.

.

[fol. 29] Q. Doctor, you don't know of your own knowledge in what direction this air hose was pointed?

A. Sir, it appears to be logical that the hose would be going across the face.

Q. Well, that is an assumption, is it not?

A. It is an assumption.

Q. Do you know, for example, what pressure was used in this air hose?

A. No, I don't.

Q. Now, Doctor, do you have any general familiarity with a ventilation system in common use aboard vessels?

A. No, I am not an engineer, and I certainly am not a nautical engineer.

Q. Do you have a general knowledge of ventilation systems?

A. A general knowledge. I wouldn't say specific or adequate or thorough. I could tell them what I want in an official capacity. I mean, I demand this and this ventilation and it is up to the engineers to meet those requirements.

Q. But in your work as a chemist, and in your lectures and your writings on the effect of noxious substances such as carbon tetrachloride you do have a working knowledge, I assume, of the operation of mechanical ventilation systems?

A. Yes, I have an acquaintance with them.

Q. Now, does not the adequacy of any ventilation system depend upon its mechanical power to a great extent?

A. To quite an extent. And also to the design of the ducts.

Q. Now, these are factors which you have no direct knowledge of in this case?

A. No. All I can do is recommend, and that is what I have done. I say that if you want to use this and this substance in this and this room, I want you to be able to remove so much air from this room, and I want the removal from the lower level or the upper level.

Q. In this particular case you have no direct knowledge of such things as the power of the system in use, have [fol. 30] you?

A. All I want them to do is to remove so many cubic feet per minute.

Q. But again I say in this particular case you have no knowledge of your own concerning the power of the system?

A. That would be required?

Q. Yes.

A. No. I could not specify whether to use a quarter horsepower or a half horsepower.

Q. In fact, you don't know what was used, do you?

A. Certainly not.

Q. And I think it is accurate to state that there are masks which may afford complete protection against one exposure which would be entirely used uselessly if used in another exposure?

A. Yes.

Q. Here again you don't know what type of mask was used?

A. No.

Q. You don't know, I assume, how recently the cannisters of that particular mask were inspected, do you you? (sic)

A. No.

Q. So actually, Doctor, the presence of these various devices that have been described to you would affect the concentration to some extent, is that correct?

A. We would have to break that down. I don't think it would be fair to make an all-inclusive answer to that question because there are quite a few factors to be considered.

Q. I haven't asked, Doctor, to give us your estimate of the concentration after these devices had been used, but would it be fair to state that there would be some effect?

A. Yes, there would be some effect.

Q. Well, Doctor, what do you say would determine the efficiency of an exhaust system on board a ship? Would the size of the blades have anything to do with it.

[fol. 31] A. The size of the blades, the shape of the blades, the angles at which they are set.

Q. Well, these are things that you don't have any knowledge of?

A. And the ducts. You asked me a question as to what would be efficient, and I can answer that question. But if you ask me to design it for you—

Q. No, Doctor.

A. You asked me what would be required to go—

Q. I think you have answered the question very satisfactorily, Doctor.

Now, my next question is, is it not a fact that you have no direct knowledge of the circumstances in this particular case?

A. Direct knowledge? No.

Q. Doctor, is it not a fact that any calculation, or any evaluation made by yourself as to the adequacy of the various types of ventilation on board this vessel must necessarily be based on information concerning the size of the equipment used, the pitch of the blade, as you have told us, and other circumstances which are apparently not within your knowledge? Is that not so?

A. Yes.

The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?

The Witness: And the amount of material present.

The Court: When you say the amount of material present, I don't follow that.

The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.

The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment.

The Court: I understand that. And whether or not the ventilating units were effective or ineffective would depend in some measure upon facts with respect to their operation and efficiency for which you do not have—

The Witness: I am not an engineer.

Q. Well, Doctor, my question in effect was, cannot a person, such a person with a susceptibility, be damaged or injured, seriously perhaps, by a concentration so slight that it would not affect a normal person?

A. Yes, it is possible.

Mr. Mahoney: "When carbon tetrachloride and alcohol are given simultaneously, the toxicity of the former is greatly increased."

The Court: All right.

Q. Do you consider that statement accurate?

A. Yes, that is a good statement.

[fol. 33] Q. You have no idea, I suppose, from what you have told us, whether or not any of these particular devices were operating properly, is that right?

A. Of course, that's right.

Q. You don't know, for example, whether the portable equipment that was brought on board was operating properly, do you?

A. Of course not.

Q. And you don't know, as you have already told us, I think, whether the gas mask was adequate or whether it was operating correctly or whether it was inspected, or anything of the sort, do you?

A. No.

Q. And you don't know whether the permanent ventilation equipment aboard the ship was adequate or not, do you?

A. Of course not.

Mr. Mahoney: That's all, Doctor.

By Mr. Mahoney:

Q. Doctor, from your previous statement, is it correct for us to understand that if the air hose in question was near floor level, that it would be efficient in circulating the air?

A. It would help, yes, quite a bit.

Mr. Mahoney: May I continue?

Q. In view of your prior statement, Doctor, concerning the exhaust equipment which was a permanent part of the ship, I think you stated to his Honor that the existence of an exhaust system would play an important part in your evaluation, is that correct?

A. Yes, I did.

Q. Now, you don't know, for example, how many outlets, permanent outlets, there were aboard this particular vessel, do you, exhaust outlets?

A. No, I do not.

[fol. 34] Q. And you don't know the location of all of the outlets aboard this particular vessel, do you?

A. No, I do not.

Q. And again you do not know whether these particular exhaust outlets were powered by a small motor or a big motor, do you? A. Of course not.

Q. And you don't know whether their shape was conducive to efficiency or whether the length of the blade was six inches or eight inches, or any of those factors are not within your knowledge, are they?

A. No.

Q. Would those factors not play an important part in any evaluation you make of the dilution or the ventilation within that compartment?

Mr. Baker: I object to it.

A. Yes.

Mr. Baker: It is fully answered.

The Court: The answer is yes!

The Witness: Yes.

Redirect examination.

By Mr. Baker:

Q. Doctor, considering these facts to be true—that on September 29, 1951, the deceased, Walter Joseph Halecki, was working in the hold of a vessel, as shown in accordance with the number of photographs which were presented to you during the course of your examination, and considering the fact that he was cleaning the generators in the engine room and that he used during the period of time that he worked eight gallons, or approximately eight gallons of carbon tetrachloride; that he started to work about 9 o'clock that morning and worked until about 3:30 that afternoon; that he did the spraying for 15-minute intervals, namely, worked on spraying for about 15 minutes and then was off and went upstairs and out of that room for about 15 minutes, and then went down again; considering the fact that during the course of that spraying he wore a gas mask, Army surplus type, cannister type; considering also the fact that in this room, which has been described as the approximate size of 40 foot by 30 foot and 18 foot high, as the outside dimensions, that there were various generators in this room, two generators, which were being cleaned, and taking into consideration that the ceiling of the room or in the ceiling of the room was the heart of the ventilating system of the vessel which has been shown in these photographs, and that the outlets were in the ceiling; and taking into consideration that in addition to that there was a blower, two air hoses, one used for the purpose of spraying the carbon tetrachloride and the other air hose used for the purpose of blowing the fumes away from the face of the person who was using it, Mr. Halecki; taking into consideration that there was also a fan, a circulating fan, on the floor of the engine room, and that there were also two doors which were above the floor of the engine room, approximately six foot or so above the floor; taking also into consideration that there were transoms which were shown in one of the photographs which were located above the engine

room, as shown in photograph B, which were open; and taking also into consideration the fact that there was a blower which was used to exhaust the fumes from this engine room which was placed and tied to a rail and facing into the engine room, the rail being shown in this photograph, Exhibit 9, and that the blower was facing down into the engine room and tied to this rail shown as in photograph 9, that this blower was operating during the time that this work was going on and was exhausting out; taking into consideration that this man wore a gas mask of the type which has been described for the period of time that he was in the engine room doing this work, and taking also into consideration the fact that when he [fol. 36] went home he complained of a sweet taste in his mouth, or a taste in his mouth, and that he was then confined to bed, he was treated by a physician for several days and then went into the hospital, where the complaints were that on the Saturday previous to his admission he had been spraying the generators, that he had that evening an onset of nausea and vomiting which was still present on his admission; that he had headaches for two or three days prior to his admission, diarrhea and oliguria for one day; taking also into consideration that he was treated at this hospital and, in accordance with the records, he had a renal and hepatic failure, and the final diagnosis was a carbon tetrachloride poisoning, and taking also into consideration that an autopsy was performed on this man, which autopsy showed a carbon tetrachloride poisoning as the anatomical diagnosis with these specific findings: necrosis of the liver, a lower nephron nephrosis, a necrotizing bronchitis with severe hemorrhage, a broncho pneumonia, a subarachnoid hemorrhage, (sic) acites and jaundice—taking all of these factors into consideration and assuming them to be true, would you say that it is your opinion that his exposure to the fumes of carbon tetrachloride was an exposure to an excessive accumulation or concentration of fumes during that exposure?

Mr. Mahoney: Exception, please. With all due respect to the doctor's qualifications, I object to an answer based on medical testimony.

The Court: I sustain the objection, and also on the ground

that I suggested to you that you put a hypothetical question to this witness based upon facts as to which there is evidence. These facts relate to conditions in the engine room. And you have again read into your hypothetical question a great many items which are referred to in the history. [fol. 37] If you will start at the point where he went home, assuming that he went home on such a day—do you follow that?

The Witness: Yes.

The Court: In other words, just referring to conditions in the engine room as they are outlined to you by counsel, do you have any opinion that you can express with reasonable certainty as to whether or not the ventilating system in that room was reasonably adequate in order to remove the fumes?

The Witness: I have an opinion.

The Court: And what is your opinion?

The Witness: My opinion is that it was not adequate.

The Court: All right, that is your opinion. That is all you want?

Mr. Baker:.. That's all.

MILTON HELPERN, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. Doctor, are you licensed to practice medicine in the State of New York?

A. Yes.

Q. What date were you licensed, please?

A. 1926.

Q. And what is your present occupation, Doctor?

A. Well, I am a physician. I am the Chief Medical Examiner of the City of New York, and also Professor of Forensic Medicine at New York University, Post Graduate Medical School, and Assistant Professor of Clinical Medicine and lecturer in pathology at the Cornell University Medical College.

Q. Doctor, how long have you been associated with the Medical Examiner's office?

A. 25 years.

[fol. 38] Q. Is it possible to state, Doctor, the concentration that would be harmful to the average individual?

A. Well, that is very variable.

Q. Depending on what factors, Doctor?

A. Depending upon susceptibility of the individual. Some people are much more susceptible to the effects of the vapors of carbon tetrachloride than others.

Q. Well, is it possible—

A. Excuse me. That also applies to persons who swallow carbon tetrachloride. In the old days carbon tetrachloride used to be used in teaspoonful doses to cause the elimination of tapeworms and it was commonly used, but a certain number of the patients reacted adversely and it no longer is used for that purpose.

As far as the effect of a given concentration of vapor, that depends on the individual as well as on the concentration. Given to people in the same environment, one may be severely or fatally poisoned and the other person might not even be rendered sick.

Q. Is it possible for a person, given predisposition you mentioned, to be seriously injured, even fatally injured, by an exposure which would be harmless to the average individual?

A. Yes, there are cases like that.

Q. Doctor, can you tell us what factors, within your experience, create this susceptibility or predisposition you have told us about?

A. Well, I think the evidence medically goes to show that the alcoholic person is peculiarly susceptible to the toxic effects of carbon tetrachloride. The alcoholic—especially the person who has been drinking alcohol at the time of exposure—is very susceptible, often to amounts of the poison which might not affect another person, inhaling the same concentration. In other words, in the same incident, two people can be exposed, in the same room, a person under the influence of alcohol and another person

not under the influence of alcohol, and the alcoholic will come down with poisoning and the other person might not even become sick.

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[fol. 39] Q. Doctor, would the history of consuming a half-pint of whiskey a day for five months preceded by the consumption of two quarts of beer a day for ten years create a condition of an alcoholic?

A. It would give me the impression that the individual is an alcoholic. If that amount is consumed every day, it would give me that impression. That does not mean that the person is necessarily a person who cannot get along with people, or anything like that at all. If that craving is there, and that much alcohol is consumed, that is a fair amount, and those estimates are usually quite rough. They are never precise, and my own reaction to that is that it is always an understatement rather than an overstatement.

Q. Now, Doctor, such a person as the one you have described, and a person with the history that I have read to you, would that person be susceptible to an exposure—when I say “susceptible” I mean susceptible to serious injury and death—to an exposure so slight that it would not affect the average person?

Mr. Baker: I object to that. There is no evidence here of a slight exposure.

The Court: Well, cast the question in a different manner. Would such a person have a readier disposition to carbon tetrachloride poisoning than a person who did not consume that quantity of liquor?

The Witness: I think yes.

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Q. Well, Doctor, assuming an individual with a history of consuming a half-pint of whiskey a day for a five-month period following a history of consuming two quarts of beer a day for a ten-year period, and assuming that individual worked for approximately a six-hour period with carbon tetrachloride, and assuming that individual subsequently was hospitalized suffering from nausea, head-
[fol. 40] aches, and so forth, and assuming that he subsequently showed indications of liver damage, of renal

insufficiency, and that after a 12-day period that individual expired, and assuming that upon autopsy it was found that the individual displayed abnormalities of the liver, do you have an opinion, Doctor, as to the causal relationship between the man's illness and death and his prior history of alcoholism?

Mr. Baker: I will object to it. There are a number of deficiencies in the hypothetical question. How much carbon tetrachloride? To what extent? I mean, there has been evidence in the case to the extent to which he has been exposed and—

The Court: You may ask him about that on cross-examination. I will allow the question.

A. I don't think there is any question that this man died of carbon tetrachloride poisoning. With the history as you gave it, with the background of alcoholism, I think it is also reasonable to conclude that that made him more susceptible.

WILLIAM M. FINKENAUER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. What is your occupation, Mr. Finkenaure?

A. I am a ship's surveyor and consulting engineer.

Q. You mentioned sometime ago that you conducted some tests aboard the pilot boat New Jersey.

A. Yes.

[fol. 41] Q. Will you tell us what those tests consisted of, please.

A. Well, we put some oily rags into a small tin can and set them on fire to make a smudge, and placed that can at different positions in the lower engine room to see if there was a series of air currents that would carry the air about, and we found out that there was. We could

also see the effect on the smoke of the air that came down through the blowers.

Q. Well, will you tell us what effect the blower and exhaust system had upon these smoke pots that you told us about?

A. Well, it was a positive demonstration of the fact that there was circulation of air in that engine room.

Q. Well, specifically how was that fact demonstrated to you?

A. By the movement of the smoke.

Q. How did the smoke move?

A. It moved away, of course, from the air that was blown in and towards the air that was drawn out.

Q. Did the exhaust system that you had in operation draw the smoke from the engine room?

A. It did, yes.

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Q. In your opinion was the system of ventilation adequate to operate on the pilot boat New Jersey?

A. It was.

Q. For what purpose was that ventilation system constructed, within your experience?

A. It was constructed for the purpose of making the engine room a comfortable place for the engine room crew to work.

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DEFENDANTS' MOTIONS AT CLOSE OF PLAINTIFF'S CASE AND ACTION THEREON

Mr. Mahoney: The defendant further moves that the action be dismissed on the specific ground that the plaintiff has shown no right to relief. He has established no causal connection between any act of the defendant and the decedent's death.

[fol. 42] Insofar as the negligence cause of action is concerned, he has failed to establish control or a duty on the part of the defendant.

Insofar as the seaworthiness cause of action, he has failed to establish that the defendant failed to supply reasonably adequate equipment.

In addition, the defendant moves for a directed verdict on the same ground and on the further ground that there is no genuine issue of fact for the jury's consideration.

The Court: The motion with respect to the negligence claim is denied.

Your other motion was with respect to the claim of unseaworthiness. What is the basis of the motion there?

Mr. Mahoney: As I stated, the defendant's motion to dismiss the claim of unseaworthiness is based on the position that the plaintiff has not established that the defendant failed in any way to supply reasonably adequate equipment.

The Court: Isn't that a question of fact particularly in view of the testimony given by the witness Gaines that in his opinion the ventilation system was inadequate?

Mr. Mahoney: I respectfully point out that Dr. Gaines' testimony was admittedly based upon inadequate information and upon speculative grounds.

The Court: Well, that is a question of fact for the jury to pass upon and you developed, in part, that there were certain factors that had to be taken into account.

On the other hand, in answer to a very full hypothetical question based upon conditions as related during the course of the testimony of other witnesses he specifically stated that in his opinion it was inadequate. Whether or not it was is a question to be passed upon by the jury.

Mr. Mahoney: I respectfully except.

[fol. 43]

DEFENDANTS' MOTION AT THE CLOSE OF THE EVIDENCE AND ACTION THEREON

Mr. Mahoney: The defendant at this time renews the motion for a directed verdict on the ground that there has been a complete failure of proof in establishing either that the defendant showed lack of care in any regard insofar as the negligence cause of action is concerned, and, moreover, that there has been no testimony based on factual evidence that the defendant failed to supply the decedent with a safe place in which to work.

The Court: * * * I hold there is a question of fact for the jury to pass upon. Your motion is denied.

Mr. Mahoney: I respectfully except.

DEFENDANTS' REQUESTS TO CHARGE

1. The decedent, as an electrician employed by an independent contractor, was not entitled to the warranty of seaworthiness.

4. Where the testimony permits more than one inference, the jury cannot speculate and the party having the burden of proof must lose.

7. If it is found that the defendant was negligent and if it is found that the decedent was contributorily negligent, such contributory negligence is a complete bar to recovery by the plaintiff.

[fol. 44]

CHARGE OF THE COURT

The Court: Ladies and Gentlemen of the Jury: At the time of your original selection as jurors, I told you that your principal function during the progress of the trial would be to listen carefully to the evidence and observe the witnesses as they testify. It has been evident to me that you have followed the testimony in the case with keen interest and that you have a full grasp of the facts that are in the case. At this time you are about to enter upon your final function as jurors, and that is to pass upon the fact issues that are in the case.

You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses and you resolve such differences as there may be in the evidence.

You are required to accept my instructions as to the law and to apply them to the facts as you may find them. In your determination of the facts, you rely upon your own recollection of the evidence. What I have said from

time to time during the progress of the trial, what I may say during the course of these instructions with reference to the facts, whatever counsel may have said during the trial or during the course of their summations, as to the facts, are in no respect binding upon you and are not to be taken by you in place of your own recollection of the evidence.

Before we consider the law that is applicable to the case proper, I think it is desirable to emphasize a matter to which I referred when you were first selected as jurors. The fact that this action is brought to recover damages for the benefit of the widow and the children of the decedent, must play no part in your consideration or deliberations. However much we may sympathize with them because of the loss of a dear one, the plaintiff in this action may not recover unless, just as every other plaintiff in a civil case, she meets the burden of proof which the law [fol. 45] casts upon her, as I shall outline it to you in these instructions, and I am sure that the plaintiff would not have it otherwise.

You play a most important role in the administration of justice. Justice cannot prevail if sympathy, prejudice or bias enter into your deliberations. If they do, you no longer render justice. Your oath of office is to render justice fairly and impartially, without fear or favor, and solely upon the evidence in the case. And I have no doubt that each one of you will fully live up to your oath of office.

The plaintiff seeks to hold the defendant, the United New York & New Jersey Sandy Hook Pilots Association, which I shall refer to hereafter as either the Association or the defendant, liable for the damages occasioned by his death, upon the ground that the Association, as owner of the vessel New Jersey, violated certain duties which it owed to Walter Halecki, as one who worked upon its ship. Halecki, as you know, was not an employee of the Pilots Association. The Association had engaged the Rodermond Corporation to do certain repair work on the New Jersey, and in turn, Rodermond subcontracted the electrical repair and cleaning work in the engine room of the ship to the K & S Electric Company, by whom Halecki was employed.

The plaintiff contends that the defendant is liable upon either one of two alternative theories. The first ground of recovery which the plaintiff advances is that Halecki, in repairing and cleaning the generator, was performing a task in the ship's service usually done by a crew member, and therefore the defendant owed him the duty to supply a seaworthy vessel. The second ground is that, as an invitee upon the ship to do the job as specified in the repair order, the defendant owed him a duty to supply a reasonably safe place in which to work.

Since these alternative theories involve different concepts of law, although in end result the basic responsibility [fol. 46] may appear to merge, we will consider each claim separately.

The first theory is based upon a historic doctrine of the sea known as the warranty of seaworthiness. This imposes upon the owner of the vessel the duty to supply crew members with a seaworthy vessel—that is, one reasonably fit for the purposes for which she was being used. This warranty of seaworthiness is not limited to the ship proper. It extends to and includes all equipment, machinery and appurtenances. Thus, the owner of a ship is under a duty to supply and keep in good order and condition proper appliances and equipment reasonably adequate and sufficient for the work to be performed, and this would include an adequate ventilating system. This means that the ventilating system must be reasonably fit for its intended use, and if not, the vessel is unseaworthy.

Halecki, as an electrician engaged in cleaning the generators, was performing a function usually carried out by a ship's crew. Under this circumstance, the law imposes upon the defendant, the Association, the same duty it owed to its regular crew members—that is, to supply Halecki with a seaworthy vessel.

Incidentally, the fact that Halecki was an employee of the K & S Electric Company does not affect the duty owed to him by the defendant Association. Its duty was non-delegable—that is, it could not be delegated to or transferred to anyone else, and it existed without regard to whatever duty Halecki's own employer or anybody else owed to him.

The shipowner's absolute and non-delegable duty to supply a vessel and appliances adequate for the work to be performed, existed regardless of whether or not defendant had control over the vessel or its appliances. This absolute duty is imposed upon the defendant, whether or not it knew of the defective equipment or inadequacy [fol. 47] or insufficiency of the appliances, should such be the fact.

If as a result of the unseaworthiness of the vessel a crew member or one engaged in performing a crew member's work is injured, then the owner of the ship is held absolutely liable, even though it was without fault. In other words, even the exercise of reasonable care does not relieve the shipowner of its obligation to furnish a seaworthy vessel and reasonably adequate equipment and appliances.

This concept, under the first claim, as you will soon see, is quite different from that involved in the plaintiff's alternative or second theory.

The essence of the plaintiff's first claim is that carbon tetrachloride, which was specified in the repair order for the cleaning of the generators of the engine room, was a known dangerous substance; that in order for men to work in safety, it was necessary to have an effective ventilation system to remove the fumes; that the ship's ventilating system, as supplemented by the exhaust blower, the air hose and other equipment, was inadequate for the use for which it was intended—that is, to remove the carbon tetrachloride fumes so as to render the engine room a reasonably safe area in which to work. This is the substance of the plaintiff's claim that the vessel was unseaworthy.

The defendant denies the plaintiff's charges. It affirmatively contends that the ship's ventilating system, with the auxiliary items, was reasonably adequate. The burden of proof that it was not reasonably adequate for its intended use is upon the plaintiff, and this she must show by a fair preponderance of the evidence, which I shall presently define.

The mere fact that you should find, if you do so find, that Halecki was poisoned by inhaling carbon tetrachloride in the engine room and died as a result thereof, does not

establish the plaintiff's claim. Indeed, it is conceded in [fol. 48] this case, as I understand the defense, that he did in fact die of carbon tetrachloride inhalation. But this does not prove the plaintiff's claim. The defendant was not an insurer of the plaintiff's safety and it is not liable for any and all injury to those working on the ship. It may only be held liable upon proof that the vessel was in fact unseaworthy.

The warranty of seaworthiness does not require the best possible equipment. Whether or not a vessel is seaworthy and its appliances adequate depends upon time, place and circumstance.

Here the New Jersey was undergoing repairs. The basic question is whether, under all the circumstances, the ventilating system was reasonably fit for the use for which it was intended, and here where I refer to "ventilating system" I am sure that you understand I am also including the auxiliary parts which were brought into the engine room.

I have said that to succeed, the plaintiff has the burden of sustaining her charges by what the law terms a fair preponderance of the evidence, and this is a burden that she has with respect to both claims, seaworthiness and negligence. What do we mean by "fair preponderance of the evidence"? It means the greater weight of the evidence, the quality of the evidence, rather than the number of witnesses. It means that the testimony on the part of the party who has the burden of proof is more persuasive and convincing than that opposed to it.

You may say that a fact is proved by a fair preponderance of the evidence when all of the evidence tends to persuade you the witness or witnesses are telling the truth. Sometimes, in order to make this definition more real, I give an illustration which I think will bring home to you just what is meant by fair preponderance of the evidence. Assume that you are in your deliberations in [fol. 49] the juryroom and are reviewing the evidence given by the various witnesses. When an item of evidence appeals to you as credible and believable and supports the plaintiff's side of the case, you will assume a hypothecary scale before you and you will put that evidence on the plaintiff's

side of the scale. And you do the same thing with the evidence which appeals to you as supporting the defendant's side of the case. And you do this until you have concluded a review of all the evidence.

If, upon the conclusion of your analysis of all the evidence, the plaintiff's side of the scale is weighted in her favor, no matter how slightly, then she has sustained her burden of proof. If, on the other hand, the scales are balanced or even, then she has failed to sustain her burden of proof, and, obviously, if the scale is weighted on the defendant's side, again she has failed to sustain her burden of proof.

The plaintiff, to sustain her burden of proof that the ventilating system was not fit for its intended use and purpose, relies in large measure upon the testimony of Robert Gaines, the toxicologist, who was called as an expert witness. Gaines in substance testified that an acceptable safe concentration of carbon tetrachloride is 100 parts per million; further, that the chemical can be used with safety if there is proper ventilation by exhaust to remove the fumes.

He also testified that in his opinion the average concentration of carbon tetrachloride in a room the size of the engine room of the New Jersey was 20,000 parts per million, but that this was the maximum which did not take into account the ventilating system and its various adjuncts; that the true concentration depended upon the effectiveness of the ventilation system in removing the fumes; further, that in order to reduce the working area to a safe condition, it would be necessary to remove 850 cubic feet of air per minute.

[fol. 50] In answer to a hypothetical question which set forth the various units of the ventilating system and in general the conditions prevailing in the engine room, Gaines gave it as his opinion that because of the way the ventilating units were located, they were inadequate to reduce the concentration to the maximum acceptable standard of 100 parts per million. And again, in his opinion, the ventilating system, with its auxiliary equipment, was not reasonably adequate to remove the fumes for men to work in safety.

The defendant, in resisting plaintiff's claim, stresses that it was not required to supply the most perfect equipment, but only equipment reasonably fit for the use for which it was intended. To establish that it met its duty, the defendant points not only to Doidge's testimony that the ventilating system in his opinion was entirely adequate for men to work, and that it functioned properly, but that Halecki himself assisted in setting up part of the ventilating system; that at no time did he complain of its inadequacy or mention the subject, although he knew of the nature of carbon tetrachloride.

The defendant further contends that the plaintiff was poisoned as a result of a predisposition to carbon tetrachloride poisoning because of his daily consumption of liquor and beer in stated quantities for some time preceding the day he worked in the engine room of the ship; that such predisposition was an unusual situation which in no way detracts from the fact that the ventilating system, under normal circumstances and for the average person who might be working there, was reasonably adequate for its intended use.

In addition the defendant also called as an expert witness Dr. Helpern, the toxicologist, or the medical examiner. He testified in substance that the consumption of liquor and beer in the stated quantities predisposed one to carbon [fol. 51] tetrachloride poisoning and that an average individual who did not indulge would likely be free from the effects of poisoning under the same conditions, and that in his opinion, decedent, by reason of his drinking, did have such a predisposition and susceptibility.

The defendant also relies upon the testimony of Finkenaar, a ship surveyor and engineer, who, after making tests of the engine room, expressed his opinion that the ventilating system with the auxiliary equipment used on September 29, 1951, could effect a complete change of air in one minute; that the addition of supplementary equipment would improve the efficiency of the ventilating system beyond that status—that is, removing it in one minute, causing a complete turnover in less than one minute. He admitted that in and of itself the ship's ventilating system would not be sufficient to remove the carbon

tetrachloride, that it needed the addition of other ventilating aids or units, and of course, the defendant's contention is that the combination of the ship's basic ventilating equipment, as buttressed by the various exhausts, air hoses and the like, did result in efficient ventilation so as to remove the fumes and to make the engine room a reasonably safe place in which to work.

And finally it counters the testimony of Dr. Gaines by emphasizing that Doidge was there and knew the actual conditions, whereas Gaines was conjecturing an opinion. In effect it contends that Doidge, as a practical man, knew conditions and he was satisfied that the ventilating equipment was reasonably adequate and functioning properly.

If, upon all the evidence, you find that the plaintiff has sustained her burden of proof that the ventilating system was not reasonably fit and adequate to eliminate the fumes so as to permit men working in the engine room to do their jobs with reasonable safety, then she is entitled to recover. And if you do so find, there would be no need [fol. 52] to consider plaintiff's alternative theory upon which she seeks to hold the defendant liable.

On the other hand, if she fails and you find the ventilating system was adequate and functioning properly, of course she is not entitled to recover on the first claim—that is, upon the claim of unseaworthiness. However, plaintiff contends that in any event she is entitled to recover upon the second or alternative theory. This second theory involves, as I have already mentioned, different elements of law. The decedent Halecki as an employee of the K & S Electric Company, of course had to enter the engine room to do his job. Under such circumstances, the law implies that the defendant association, as the owner of the ship on which the work was to be done, invited him there for that purpose. The defendant, as the owner of the ship, apart from its duty to supply a seaworthy vessel, then also owed to Halecki and to his fellow employees as such invitees, the duty to use reasonable care to see that the engine room was a reasonably safe place in which to perform their work.

Incidentally, in this instance too the fact that Halecki was an employee of the K & S Electric Company does not

affect the duty of the defendant to supply a reasonably safe place to work to invitees. Again the defendant's duty was non-delegable and it persisted despite any concurrent duty which Halecki's employer or the shipyard may have owed to him.

The plaintiff contends that the defendant violated this duty, that it was negligent. You will note that under the first claim that of unseaworthiness, it mattered not whether the defendant exercised reasonable care, or whether it knew or did not know the ventilating system was adequate. Under that claim it is the fact of inadequacy or lack of fitness, if you do so find, that is crucial. But under the alternative claim, which we are now considering, the crucial question is whether the defendant was negligent.

[fol. 53] This brings us to the question: What do we mean by negligence? It is the failure to use ordinary and reasonable care under a given set of circumstances.

Negligence is doing that which a reasonably prudent person would not have done, or failing to do that which a reasonable person would have done under all the circumstances of a given situation. The defendant denies that it was negligent and further contends that the decedent himself was solely responsible for events, and if so, this would bar any recovery by the plaintiff, and it further contends, if not solely responsible, then Halecki, by his own conduct, contributed to his death, in which event this would go in reduction of damages, as to which I shall further instruct you when I consider the question of damages.

With regard to the second claim—that is, of negligence—again the mere fact that the decedent was poisoned by carbon tetrachloride and died in consequence does not in and of itself establish that the defendant was liable. Again, the shipowner is not an insurer of the decedent's safety. Its liability depends upon proof of negligence, the burden of which rests upon the plaintiff. Under either theory, plaintiff must establish that the decedent's death was the proximate result, either of the defendant's negligence or the alleged unseaworthiness of the vessel.

What do we mean by "proximate cause"? It is a cause which naturally led to and might have been expected to produce the result it did. Proximate cause is the effective producing cause of a claimed injury or death.

As I said sometime back in this case, there does not appear to be any question but that the decedent died of carbon tetrachloride poisoning. To establish the claim of negligence, the plaintiff, in large measure, depends upon the same evidence as that offered to support the charge of unseaworthiness. In addition she claims that the defendant's chief officer and other officers knew that Halecki [fol. 54] and Doidge were going to work in the engine room on Saturday, September 29th; that the officers of the ship knew that the use of carbon tetrachloride was dangerous; that even assuming the ventilating system was adequate at the start of the day's work, reasonable conduct required the ship's officers to have checked from time to time to make sure that it was adequate and functioning properly while the men were working there; that in the exercise of reasonable care, they either knew or should have known that the auxiliary equipment, placed as they were in the engine room, would not be adequate to remove the fumes; that it was not prudent conduct to rely upon Doidge or the employer, K & S Electric Company. The plaintiff points to the testimony of Captain Haley—that is the testimony which was read from the deposition yesterday—that while the vessel was undergoing repairs, it was under the jurisdiction of him and the marine superintendent of the defendant, and if there were any unsafe conditions aboard the vessel, it would be up to either of them to see that such conditions were corrected.

Under this circumstance, plaintiff contends that the defendant should have known of unsafe conditions and taken appropriate steps to correct them. The defendant, in resisting this claim, again states it acted as any reasonably prudent person would have under all the circumstances.

You ask yourselves, did the defendant through its officers, act as the ordinary and reasonably prudent person would have in discharging its duty to provide a reasonably safe place for the decedent to work in? In not making a further check when they knew that Doidge had added to the ventilating system?

The defendant, as you know, contends the system, as augmented by the exhaust blower, air hoses and the like,

was adequate certainly for the average man without any predisposition to poisoning.

[fol. 55] In deciding whether the defendant acted in a reasonably careful manner, you may take into account the decedent's prior health and predisposition to carbon tetrachloride poisoning, if in fact you find he was so predisposed. You ask yourselves, was it reasonably foreseeable that one of the men working in the engine room would, because of his habits, show a predisposition to such poisoning? Should the defendant, in the exercise of reasonable care, have known this?

In other words, if you find that with respect to the average worker, one might expect in that kind of job and in that engine room, the ventilation system was adequate, then simply because one individual is prone to poisoning, and this is unusual, it would not mean that the defendant failed to act as a reasonably prudent person.

You ask yourselves whether under all the circumstances the defendant exercised reasonable care to supply an adequate ventilating system and to see that it functioned properly so that the engine room was a reasonably safe place in which to work.

If you find that the ventilating system, either upon installation or after it commenced to function, was inadequate to withdraw the fumes and resulted in creating an unsafe and dangerous condition for men working there, and further find that the defendant knew or, in the exercise of reasonable care, should have known this, and failed to cause the condition to be corrected by the contractor or itself failed to correct the condition, then you have sufficient upon which to find the defendant negligent.

If you find that the defendant was negligent and that such negligence was the proximate cause or one of the contributing causes of the death of the deceased, if there was also concurrent negligence on the part of Halecki's employer, the K & S Electric Company, that will not absolve the defendant from responsibility for its own acts of negligence.

[fol. 56] I mentioned a moment ago that in deciding whether the defendant acted in a reasonably careful manner, you may take into account, in deciding that issue, the

decedent's prior health and predisposition to carbon tetrachloride poisoning. However, if you decide or should find that the defendant was negligent or that the vessel was unseaworthy, and this was the proximate cause of Halecki's death, then the defendant is liable to respond in damages even though the deceased had a predisposition to carbon tetrachloride poisoning and the defendant was without knowledge of this fact. In other words, once you find, upon all the evidence, that there was negligence or unseaworthiness, the fact that he had a predisposition would make no difference because a man's health is taken in whatever state it is.

You (sic) determination of the issues in this case in some measure will depend upon how you appraise the testimony of experts. Just as laymen frequently disagree as to matters within their observation, even without intending to state untruths, so experts frequently are in disagreement in their judgments as to matters within their professional competence. How do you evaluate the testimony of witnesses, lay and expert? In your search for the truth you use your everyday common sense. As I say to jurors so often, when you walk into the door of the courtroom and sit in the jury box and listen to evidence and then go into the jury room and deliberate, you do it with your common sense with you at all times. You don't leave it outside the door of the courtroom.

You have seen the witnesses and have observed their manner of giving testimony. How did the story impress you? Did the witness appear to be truthful, candid and fair? Did he appear forthright? Did his judgment, if he is a professional witness—that is, an expert witness, on professional matters, carry the stamp of knowledge and experience and did his judgment appear sound?

[fol. 57] In other words, in determining the credibility of witnesses; you apply your everyday common sense and experience and act precisely as you would in determining an important matter in your own daily lives where you are called upon to act upon the basis of whether or not you are receiving accurate and truthful information.

If upon all the evidence you find that the plaintiff has sustained her burden of proof, that the vessel was un-

seaworthy or that the defendant was negligent, then and only then do you reach the question of damages. Of course, if she has failed, that would end the case and you do not consider the question of damages at all.

Incidentally, the fact that I charge you on damages does not mean that the Court entertains any view as to how you are to decide the case. That, as I have mentioned a number of times, is exclusively your function.

There are two separate claims for damage to be considered. One is under the Death Act of the State of New Jersey. I suppose some of you wonder why it is under the State of New Jersey. We apply New Jersey law because the decedent was a resident of New Jersey at the time of his death. So that law is applied even though the case is being tried here in the Federal Court.

Under that act, the plaintiff seeks to recover damages for the pecuniary loss which the widow and the three children who were dependent upon Halecki, have suffered by reason of his death. Under that law, the widow and her three children are entitled to recover for the deprivation of the reasonable expectancy of contributions of a pecuniary nature, and the probable loss of direct services in and about the home. This includes the loss of any services having a pecuniary value which the deceased might have rendered to his wife and the three children, had he lived. You are not to include any award by way of compensation for their grief and sorrow, occasioned by their [fol. 58] bereavement, however sympathetic you may feel towards them, and obviously no award of damages under the circumstances would be sufficient to compensate a family for the loss of a dear one.

In considering the pecuniary or the monetary loss, you consider Halecki's normal income and the amount which he contributed in the past for their support. You may take into account the state of his health, his work habits, and life expectancy, and the likelihood that he would have continued to work during the period or the greater period of his life expectancy. You may consider that his earnings would not necessarily be constant. The deceased's prospects of advancement or increased earnings may also be taken into account.

Halecki was 40 years of age when he died. His widow was 36 years, and the three children were then respectively 14, 11 and 5 years of age. The testimony in the case is that in 1950, Halecki earned almost \$3400; that in 1951, up to the date of his death, he earned \$3250. These earnings were based upon a \$2 per hour rate for an electrician, and it was stipulated the present rate on his job is \$2.40 per hour. I believe counsel in his summation made a reference to \$2.60. My own recollection is \$2.40.

Mr. Mahoney: I think 2.60 is correct.

Mr. Baker: 2.60.

The Court: Then I stand corrected.

Mrs. Halecki testified that Mr. Halecki turned over his entire pay for the support of the family, that she gave him about seven or eight dollars per week for carfares and incidentals, that he spent about sixty or seventy dollars per year for his clothing. You also have a right to take into account the value of his board and lodging as a member of the family, in determining what the net contribution was that he made to the family. In any event, the plaintiff claims that the net amount retained for the support of the family was approximately \$3000 per year.

[fol. 59] First you must determine the reasonable, likely future earnings of the decedent and the contributions which he would have made to his wife and three children for their support had he lived. Once you determine the likely annual contribution to the wife and dependents, and the period thereof, the pecuniary loss so sustained must be reduced to its present value.

This is a matter of computation depending upon the rate of interest you apply. It is in effect capitalizing at a reasonable rate of interest that sum which would yield annually the same income or support which the wife and the dependent children would reasonably have been expected to receive from the decedent. In other words, you must also contemplate exhausting the fund in full. You don't figure a capital sum to yield a fixed annual income, because the fund must be exhausted in its entirety at the end of the period which you estimate that the widow and dependent children would have received income.

To assist you in this computation, the plaintiff has produced the testimony of an actuary. Parenthetically, I should add that I granted a motion to strike all his testimony which related to annuity rates based upon the life of the husband alone, and the only figures which you are to consider, if you do decide to consider them, are those based upon the joint lives of the husband and wife. The actuary testified that the present value of an annuity of one dollar, based upon the joint life expectancy of the decedent and his wife, at 3 per cent, is \$16.72, and at 4 per cent, it is \$14.82.

Simply by way of example—and please understand that this is only by way of example—assume that you find that the amount of contribution would have been at the rate of \$3000 per year. You multiply that annual sum by the annuity rate, whether 3 or 4 per cent, or such rate as you believe might be considered under present conditions a fair rate of return, without requiring more than an average skill in investing.

[fol. 60] Using the \$3000 annual contribution as an example and a 3 per cent rate, you would multiply the annual amount, annual sum by \$16.72, and that would give you a total of \$41,800. That would represent the present value of the damages.

Again, using the theoretical \$3500 sum and 3 per cent interest, you would multiply the \$3500 by 16.72, and that would give you \$58,520.

Or, if you decide to use the 4 per cent rate, then you would multiply, in the instance of \$3000, or \$3500, whichever you decide the annual contribution to be, by \$14.82 which would give you \$37,050, in one instance, and \$51,870 in the other.

In other words, using multiples of \$2500, \$3000 and \$3500, and a 3 per cent or 4 per cent interest rate, based upon the joint expectancy of the decedent and his wife, there is a range of present value of pecuniary damage, depending upon the annual contribution and the rate of interest you use, of from \$37,050 to \$58,520.

These were various examples placed upon the blackboard by the actuary yesterday. However, you are not bound to use any of these figures or rates. You decide for your-

selves whatever you determine to be the loss of annual contribution, and act accordingly. You compute the damages and you determine its present value, and I am sure it is clear to you that you do not have to find a precise dollar amount. You reach a conclusion representing a fair amount, applying the standards I have outlined.

Finally, there is the second claim for conscious pain and suffering of the decedent, and here too you must determine what amount, if any, is to be awarded for the conscious pain from September 29 to October 12, 1951, the date of his death. You have had the testimony as to the nature of this illness during this period. In this instance, unlike the claim for the benefit of the dependents, there is no yardstick really to guide you except your good common sense and your judgment. Again, sympathy must not be substituted for reason and common sense. The purpose of the law is to award just and fair compensation. Your award must be neither excessive nor inadequate. It must be fair and reasonable.

When you have reached a conclusion as to the amount of pecuniary damage, and also, for conscious pain and suffering, your work is not concluded. The defendant in this case, as I mentioned earlier in these instructions, has raised the defense of contributory negligence. Contributory negligence on the part of Halecki, the decedent, has been raised as an issue. In other words, the defendant claims that should you find that it was negligent or that its vessel was unseaworthy, then the decedent, by his own conduct, contributed in part to the events that led to his death. If this is so, and the defendant should succeed in sustaining its defense, then the defendant is entitled to a reduction of the damages in each award to the extent that you find the decedent contributed to his own death. Halecki was under a duty to exercise reasonable care for his own safety, and a failure to do so was contributory negligence.

Simply stated, contributory negligence is the doing of some act or an omission to do some act amounting to a want of ordinary care for his own safety. The basic contention here is that Halecki assisted in setting up the ventilating system, and if it proved inadequate and ineffective

for the purpose for which it was intended, he was present, was aware of conditions, and in some measure was responsible therefor. If you find, in fact, that the decedent was contributorily negligent, then you determine to what percentage or extent he was negligent. In other words, if you find he contributed 50 per cent or a greater or lesser percent, you will deduct that amount from the damages to be awarded under the two claims to which I have referred.

[fol. 62] Incidentally, this rule is quite unlike the rule that prevails in the State Court, and some of you may have sat in cases in the State Court where the defense of contributory negligence bars a recovery by the plaintiff entirely. This rule is not applied in this type of case. It is called the rule of comparative negligence.

Since the defendant sets up the defense of contributory negligence, the burden of establishing it is upon the defendant, and this it must do by a fair preponderance of the evidence. If it succeeds, it is entitled to a reduction to the extent of decedent's own negligence. And of course, if it fails, no reduction is to be made.

In discussing in summary fashion the evidence and the contentions of the parties, I have of necessity omitted substantial portions of the testimony offered by both sides. My failure to touch upon other evidence in the case or to mention all the evidence is no indication that such other evidence is not important. Nor does the mention of particular testimony in these instructions indicate that it is of greater importance than that not mentioned. All evidence in the case is important and it is your duty to review fully all evidence in reaching a conclusion on the issues that you are called upon to consider. My purpose in making reference to the testimony was to set up in broad outline the various contentions of the parties so as to bring the issues within proper focus.

I have already told you—and I am emphasizing it now—if your recollection of the evidence differs from any reference that I have made to testimony, you are to rely entirely upon your own recollection, and to have no hesitancy in rejecting such references I have made and which do not accord with your own recollection.

I believe I have also mentioned this during the course of the trial when I asked questions of witnesses. The Judge has the right and indeed a duty to see that facts are clearly presented, and the purpose was to clarify matters in the [fol. 63] case. However, you are not to draw any conclusion that by reason of my interrogation of witnesses, I have any point of view as to that witness's credibility or how the case is to be decided. That is your function, and as I said at the outset of the charge, you are the exclusive judges of the facts, and none may invade your province.

Under your oath you are sworn to try this case in accordance with the law and the evidence, and to render a true verdict accordingly. You should not be motivated by sympathy or by prejudice. You should not be concerned—and I am sure you will not be concerned—with who are the plaintiffs or who is the defendant. All stand equal before the bar of justice. Your duty is to resolve the issues fairly and impartially. You came into the jurybox without any preconceived views, ideas or opinions concerning the right or wrong of either party, and what you now know about it should have been learned only from the witness stand and from the exhibits in the case. Your final determination of the facts must be based upon the evidence.

Each of you is entitled to his or her own opinion, but you are required to exchange views with your fellow jurors. That obviously is the purpose of jury deliberation, to review the evidence and analyze it, discuss it and reach an accord, if you can do so without violence to your own conscientious judgment, as to how the case should be decided. However, if you have a point of view that differs from that of your fellow jurors, and if upon discussion you are persuaded that your point of view is erroneous, you should have no hesitancy in changing your point of view. But you should do this only if you are conscientiously satisfied that the verdict requested is in accordance with your view of the evidence and the law in the case.

To report a verdict, it must be unanimous.

I have prepared a form of special verdict which I will hand to the foreman of the jury; and in the event you find [fol. 64] for the plaintiff, it sets forth, "Please answer the following." That is, in the event you find for the plaintiff:

"1. We find the damages:

"(a) In the claim for pecuniary loss to the widow and dependent children to be in the sum of," and the amount is blank. You fill in whatever amount it is.

"(b) In the claim for conscious pain and suffering to the decedent to be in the sum of," and there is a blank.

Should you, during the course of your deliberations, require any of the exhibits, if you send a note out, we will be glad to send them in to you. I think you should still remain in the box. There may be matters counsel may want to discuss. Please do not deliberate. Do counsel want to see the Court?

Mr. Mahoney: Your Honor, there are certain matters I would like to discuss.

The Court: All right, we will see you inside then.

(The following discussion took place in chambers out of the hearing of the jury.)

The Court: Counsel for the plaintiffs, any exceptions?

Mr. Baker: No exceptions.

The Court: Counsel for the defendant?

DEFENDANTS' REQUESTS TO CHARGE

Mr. Mahoney: Your Honor, defendant requested an apparent inadvertent error be corrected. Defendant requests that. I believe in your Honor's charge you stated that the witness Finkenaaur testified that the ship's ventilating system, with the auxiliary equipment, was capable of changing the air within one minute.

Mr. Baker: No.

[fol. 65] The Court: No, I did not say that.

Mr. Mahoney: You went on—it indicates that is what you meant to say. He said this could be improved by the use of additional equipment.

The Court: No, what I did say is that the rate of changing air would even be improved by the use of auxiliary equipment.

Mr. Mahoney: That's correct, but I believe your first statement was as I stated.

The Court: If you think I made a mistake on that, I will correct it. Just let me find that a moment.

Mr. Baker: My recollection is that that was not so.

The Court: It is nothing to discuss. We will find it immediately.

(Court searches notes.) Well, I think you are right. I did refer to the fact that the ventilating system, with the equipment, could effect a change within one minute. I meant the ship's ventilating system, without the auxiliary. You are right.

Mr. Mahoney: I would appreciate if you would make that change.

The Court: I don't know how it escaped me.

Mr. Mahoney: Your Honor, defendant further requests, in accordance with your earlier informal ruling, that the jury be charged that the defendant's failure to warn—I am sorry—that the defendant had no obligation to warn the plaintiff of the dangerous characteristics of the substance, in view of the decedent's experience with the commodity.

The Court: Well, I mentioned that not only in informal discussions, but in a statement on the record when I indicated to plaintiff that I would refuse to instruct the jury that there was any duty to warn. I think I also indicated to you I do not see any purpose in instructing the jury on that. They do not know anything about warning. If you press it, I will give it to them, but are you not really complicating something? They know nothing about a duty to warn concerning the nature of carbon tetrachloride.

Mr. Mahoney: Well, I request that you so charge, your Honor.

The Court: I will give it to them. It does not make any difference.

Mr. Mahoney: The defendant further requests—

The Court: Wait, let me get that down. Go ahead.

Mr. Mahoney: The defendant further requests that it be emphasized to the jury that instructions on computation of damages, together with the form for a special verdict, be no indication that damages are to be considered.

The Court: Well, I have already instructed the jury on that once and I am not going to emphasize any one part of the charge as against any other.

EXCEPTIONS TO THE CHARGE

Mr. Mahoney: And defendant respectfully excepts to your Honor's charge to the effect that the plaintiff was entitled to a seaworthy vessel, and defendant respectfully excepts to your Honor's charge that contributory negligence is not the rule to be applied here, in accordance with our prior requests of charge.

The Court: I asked you to give me authority on that to overcome the Pope and Talbott case. I asked you to give me that several days ago. You have not given it to me yet, and the decision will stand.

Mr. Mahoney: Do you want authority on the record?

The Court: No.

Mr. Baker: May I ask one point for clarification, with respect to the question of damages? I leave it to your Honor, in your discretion, to determine what should be done. In giving the jury the tables that your Honor indicated the jury has a right to consider in arriving at a [fol. 67] verdict, those tables only covered the contributions, the wage contributions. Do you think, for the purpose of clarification, you should indicate that that does not include any additional amount that they may find he is entitled to?

The Court: You don't mean for the purpose of clarification, you mean for the purpose of emphasis, and I refuse to do it.

Mr. Baker: I mean simply—

The Court: No, I refuse to do that.

Mr. Baker: I think it was for contributions only.

Mr. Mahoney: Your Honor, for the purpose of the record, may I register objections to certain parts of counsel's summation?

The Court: No, you may definitely not do that at this point. Counsel concluded his summation at 11.45. There was a recess of fifteen minutes before the Court began its instructions to the jury. The Court commenced its charge at 12 o'clock. It is exactly 1 o'clock now, and not a single word has been said up to this moment.

(End of discussion in chambers out of the hearing of the jury and the proceedings were resumed in open court as follows):

The Court: Members of the jury, while I did tell you several times that if I made a reference to testimony that did not accord with the record or your own recollection, of course you will disregard it, counsel has called my attention to a statement I made in the charge which I agree with is incorrect, and I don't know how this clause slipped in there. I am going to correct the statement. It is a statement with respect to the testimony (sic) given by Finkenaur, the ship surveyor. My original statement was that the defendant also relies upon the testimony of Finkenaur, a ship's surveyor and engineer who, after making a test of the engine room, expressed his opinion that the ventilating system, with the auxiliary equipment used on September [fol. 68] 29, 1951, could effect a complete change of air in one minute.

Well, that statement is incorrect in so far as I included the reference "with the auxiliary equipment." His testimony was that the ship's ventilating system, the permanent ventilating system, could effect a change of air in one minute, and, as a matter of fact, the next clause would indicate that that is what I had in mind because he further testified that if you added further ventilating equipment to it, such as was brought in, that would cause an even more efficient turnover of air and cause a complete turnover of air in less than one minute. So I am glad to correct that statement without relying upon you to correct it for me.

There is just one other item I am going to mention. The evidence in this case establishes that the decedent, as well as Doidge and everybody, knew that carbon tetrachloride was a dangerous substance. Under this circumstance, I charge you that the defendant was under no duty to notify Halecki that it was dangerous, since he already knew it.

Does that meet your requirement?

Mr. Mahoney: Thank you, your Honor.

The Court: All right.

I tell you what we are going to do. Ernest, you follow my usual rule that you eliminate from the oath that they are to be kept without food and drink. The oath that is given is a very ancient one going back—some day we will trace how far back it goes, but maybe four or five hundred

years, and generally—you may have heard it administered in other courts, but I am rather strict about it. It is to the effect that you shall keep the jury without food and drink until a verdict they do reach. Then sometimes we allow them to have some liquid inside, of only one kind, and even then sometimes we send them out for food, as we are about to do now, because I think you ought to have your lunch first and start in a very relaxed way. It is an important [fol. 69] case to the plaintiff and it is an important case to the defendant. And I think everybody will be much better off if you have your lunch first and then come back to deliberate.

(Marshals sworn.)

(At 1.10 o'clock p.b. (sic) the jury went to lunch and returned to deliberate at 2.10 o'clock p.m.)

(At 4.07 o'clock p.m. the following took place):

(Roll call of the jurors.)

The Clerk: Madam Forelady, have you reached a verdict?

The Forelady: Yes, we did.

The Clerk: How do you find?

VERDICT

The Forelady: For the plaintiff. Do I have to read it?

The Court: Yes, read it.

The Forelady: Okay.

"Question: In the event you find for the plaintiff, please answer the following."

Yes, we find the damages in the claim for the pecuniary loss to the widow and dependent children to be in the sum of \$62,500; in the claim for conscious pain and suffering to the decedent, to be in the sum of \$2500.

The Clerk: Thank you. Please be seated.

Ladies and gentlemen of the jury, listen to your verdict as it stands recorded in this case now on trial. You say you find a verdict for the plaintiff as follows: In the claim for pecuniary loss to the widow and dependent children,

to be in the sum of \$62,500, and in the claim for conscious [fol. 70] pain and suffering to the decedent, to be in the sum of \$2,500; total amount, \$65,000, and so say you all?

(Jury nods assent.)

The Court: Any motions?

**DEFENDANTS' MOTIONS AFTER VERDICT
AND DENIAL THEREOF**

Mr. Mahopey: Your Honor, defendant at this time makes a motion to set aside the verdict, makes a motion for judgment notwithstanding the verdict and in the alternative, a motion for a new trial.

The Court: Motions denied.

Mr. Mahoney: Respectfully except.

[fol. 71]

**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civ. 87-269

ANNA HALECKI, administratrix ad Prosequendum of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, administratrix of the Estate of WALTER JOSEPH HALECKI, deceased, Plaintiff,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation, Defendants.

JUDGMENT—January 16, 1957

The above entitled action having come on for trial before Honorable Edward Weinfeld, United States District Judge, on December 28, 1956, January 2, 3 and 4, 1957, and a jury having rendered a verdict for the plaintiff, and

against the defendants, and the following written questions having been submitted to the jury, and having been answered as set forth therein,

In the event you find for the plaintiff please answer the following: "Yes"

1. We find the damages:

(a) In the claim for pecuniary loss to the widow and dependent children to be in the sum of \$62,500.00

[fol. 72] (b) In the claim for conscious pain and suffering to the decedent to be in the sum of \$ 2,500.00

It is Ordered and Adjudged that the plaintiff have judgment against the defendants in the total sum of \$65,000.00 and that the plaintiff recover of the defendants costs to be taxed, and that she have execution therefor.

Dated, New York, N. Y., January 16th 1957.

Edward Weinfeld, U. S. D. J.

Judgment entered January 17th 1957.

Herbert A. Charlson, Clerk.

Costs taxed in favor of plaintiff in sum of \$130.80.

Herbert A. Charlson, Clerk.

1/15/57

[fol. 73]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Dated January 29, 1957

Notice is hereby given that United New York and New Jersey Sandy Hook Pilots Association, et al., defendants above named hereby appeal to the United States Court of Appeals for the Second Circuit from an order denying defendants' motion for a new trial; from an order denying defendants' motion for a judgment notwithstanding the verdict and from the verdict of the jury and the final judgment entered thereon in the above entitled cause on the 17th day of January, 1957.

Dated: New York, New York, January 29, 1957.

Dougherty, Ryan & Mahoney, Attorneys for Appellants, Office & P. O. Address, 67 Wall Street, New York 5, New York, WH 4-6490.

[fol. 74] To: Nathan Baker, Esq., Attorney for Plaintiff, Office & P. O. Address, 1 Newark Street, Hoboken, New Jersey, and 401 Broadway (Room 2201), New York City.

[fol. 75] [File endorsement omitted]

APPELLEE'S APPENDIX TO BRIEF—Filed October 31, 1957

[fol. 76] EXCERPT FROM TRANSCRIPT OF TESTIMONY

ANNA HALECKI, the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where do you live at the present time?
A. 132 Essex Street.

The Court: Where is that?

The Witness: Jersey City.

Q. Mrs. Halecki, how old are you?

A. I am 41 years old now.

Q. At the time of your husband's death, that is, Walter Joseph Halecki, how old was he at the time?

A. He was 40 years old.

Q. At that time how many children did you have?

A. I had three.

Q. When were you married?

A. I was married January 23, 1937.

Q. You married Walter Halecki, the deceased in this case?

A. That's right.

Q. And you have three children of that marriage?

A. That's right.

Q. What are the names of these children and their ages at the time when the death took place.

A. I have three children. One is a boy and two are girls.

Q. The boy, what is his name?

A. The boy's name is Robert.

Q. How old was he at the time?

A. He was 14 years old.

[fol. 77] Q. How old is he now?

A. He is 19.

Q. The next child.

A. It is a girl. She is 16 years old.

Q. What is her name?

A. Diane.

Q. She is now 16?

A. Yes.

Q. At the time—

A. She was 11 years old.

Q. And the next child?

A. Carol.

Q. How old was she at the time?

A. She was 5 years old.

Q. Do all these children live with you at the present time?

A. Yes.

Q. Did they live with you at the time this happened?

A. Yes.

Q. Did you live with your husband at that time and the children?

A. Yes.

The Court: How old were you at the time of the accident?

The Witness: I was 36 years old.

Mr. Baker: I offer in evidence the appointment of Mrs. Halecki as administratrix.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 1.)

Mr. Baker: I offer in evidence the three birth certificates of the three children.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 2.)

Q. What type of work was your husband doing before his death?

A. Electrician.

Q. He was an electrician?

A. Yes.

Q. Do you know the name of the company he worked for?

A. K & S.

[fol. 78] Q. K & S Electrical Company?

A. Yes.

Cross examination.

By Mr. Mahoney:

Q. Mrs. Halecki, you don't have any direct knowledge of your own of your husband's work on the pilot boat New Jersey?

A. No.

Q. Mrs. Halecki, at the present time you have an action pending in New Jersey?

Mr. Baker: Just a moment. I object to that. I think

that should be subject to the Court's ruling before the question is put.

The Court: Let me see the papers that you refer to. For the time being I am going to sustain the objection. This may be independent grounds of liability.

Mr. Mahoney: Exception.

The Court: You may offer it for identification.

Q. Mrs. Halecki, I show you these papers—

Mr. Baker: Your Honor, I think it is improper to refer to it. Your Honor has ruled they should be marked for identification and that is what he should do.

The Court: Offer them for identification.

(Marked Defendant's Exhibit A for identification.)

The Court: We are interested in only one question: whether or not the plaintiff will sustain a claim here against this defendant.

[fol. 79] Mr. Mahoney: No further questions.

Mr. Mahoney: I have no further questions.

(Witness excused.)

DONALD DODGE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Doidge, what is your present occupation?

A. Electrician.

Q. How long have you been an electrician?

A. About 30 years.

Q. In September of 1951 by whom were you employed?

A. By the K & S Electric Company.

Q. Who is the boss of that company?

A. Mr. George Kuntz.

Q. Now, what was your job with them at that time? What position did you hold?

A. I was the shop foreman.

Q. You were the foreman?

A. Right.

Q. And how long had you been foreman before that date in September 1951?

A. I would say approximately eight years.

Q. And at the present time are you still working with the K & S Electrical Company?

A. No, I am not.

Q. What is your work at the present time? Whom do you work for?

A. Well, I am an electrician working for a New York concern, Mason, Nixon & Kennedy.

Q. In the course of your work for the K & S Electrical Company did you work on ships or vessels?

A. Yes, sir.

Q. And how long had you been working on different vessels before September of 1951?

A. I would say about 12 years all together.

[fol. 80] Q. How long had you been working with Walter Halecki?

A. I think it was around six years.

Q. That was before this September 1951?

A. Yes, sir.

Q. And during that period of time were you his boss?

A. Yes, sir.

Q. He worked under you?

A. That is right.

Q. Now, with reference to the work on this vessel, was it the New Jersey, the name of the vessel?

A. That is right.

Q. Where was that vessel docked?

A. In Rodermond Shipyards, foot of Henderson Street, Jersey City.

Q. Do you know when it was docked at this location?

A. Well, I know it was September of 1951. I can't remember dates.

Q. What was the first date that you went aboard this vessel?

A. I think it was on a Monday.

Q. The date that this work was done that we are concerned with was September 29, 1951. That was a Saturday?

A. Yes.

Q. Are you referring to the Monday before that Saturday?

A. Yes, sir.

Q. Were you acquainted with a contract with reference to the work to be done by your company?

A. Yes, sir.

Q. On this vessel. Where were you shown this contract?

A. Well, it was handed to me by somebody. I don't remember exactly who. But it might have been a man from Rodermond Industries office or it might have been my own boss. I don't remember.

Q. Does this appear to be the specification of repairs which was shown to you?

A. Yes, sir, that is it.

Mr. Baker: I will offer that in evidence.

[fol. 81] Mr. Mahoney: I have no objection to this document as a list of the repairs, but I object to its characterization as a contract.

Mr. Baker: We have asked and served a subpoena on the defense to produce the contract. Do you have it now?

Mr. Mahoney: We do not.

Mr. Baker: Will it be produced?

Mr. Mahoney: This document is entitled Rodermond Industries. It is not a document purporting to be between this defendant and any other party. We have no such document as Mr. Baker holds in his hand. This is a list of repairs represented by Rodermond Industries.

Mr. Baker: On the account of this defendant, New York and New Jersey Pilots Association, 24 State Street.

Mr. Mahoney: This defendant has no such document.

The Court: Don't discuss it before the jury.

Members of the jury, just as statements made by counsel in their opening are not evidence, these statements are not evidence. They really have nothing to do with the case.

Mr. Baker: I thought we would save a little time, your Honor.

The Court: Is there any objection to it going in?

Mr. Mahoney: No, your Honor.

(Marked Plaintiff's Exhibit 5.)

Q. With reference to Exhibit 5, particularly what of this list of repairs were you to work on, you yourself, with Mr. Halecki?

A. Well, here it is, item No. 2, port and starboard generators.

[fol. 82] Q. Will you read from that item 2 as to the work you were to do with Mr. Halecki?

A. It says clean and adjust brush riggings and brushes, spray clean with carbon tetrachloride the armature and field winding to remove all traces of dirt and film. Close up and prove in good order.

Q. And this appears in this document under item No. 2?

A. That is right.

The Court: Who gave you that document?

The Witness: As I said before, sir, I don't remember who gave it to me. It might have been my boss or it might have come in from the boy that makes them up in Rodermond's office. I don't remember which, sir.

Q. And who did you consult with on the vessel with reference to this item that you mentioned, No. 2, when you went there on that Monday?

A. Well, in reference to the engine room work, I got to the chief engineer on the boat.

Q. Did you discuss that item number 2 with the chief engineer?

A. At some time. I don't know if it is just Monday.

Q. And that is the chief engineer on the vessel?

A. Yes, sir.

Q. What took place at that time when you discussed it with the chief engineer on the vessel?

A. Well, we knew we had to do this cleaning and it is taken for granted, at least, we know it has to be done when there is nobody else on board ship. So we just wanted to determine when would be the best time to do it. So it was either done at night or on the week-ends. So the chief agreed that would be the best for him that it be done on a Saturday.

Q. When you say the chief, you mean the chief engineer on the ship?

A. Yes, sir.

[fol. 83] Q. And that was agreed then to have it done that coming Saturday, the 29th of September, 1951?

A. Yes, sir.

Q. Did you discuss with him at that time the work to be done with carbon tetrachloride?

A. Oh, yes.

Q. And what was said by you and what was said by him, if you can recall that?

A. Well, it was just a discussion as to when the best time would be to do it, to do the work.

Q. Did you know at that time that the carbon tetrachloride was dangerous?

A. Yes, sir.

Q. And you had known it for some time before that date?

A. That is right.

Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time?

A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor.

Q. And the time that you picked was the time when no one else would be on the vessel?

A. That is right.

Q. You discussed that with the chief engineer?

A. Yes, sir.

Q. Was it then understood that there would be nobody else on the vessel, other than the men who were working?

A. Yes, sir.

Q. Now, did you discuss this work with anyone else aboard that vessel?

A. I don't think so.

Q. Did you go on board that vessel on any other date?

A. Oh, yes, we were working on it all week.

Q. What sort of work were you doing on it all week?
 [fol. 84] A. General repair work, according to the specifications, the items that had to be done.

Q. And Mr. Halecki worked there with you?

A. That is right.

Q. And were the members of the ship's crews and officers, were they aboard the vessel all week?

A. Yes, sir.

Q. What were they doing aboard the vessel all week?

A. Well, the engine crew were working on the diesel engines down below decks.

Q. Now what were they doing with them?

A. They were removing the heads on the diesel engines. I don't know in reference to what.

Q. That was the ship's crew that was doing it?

A. That is right.

Q. And you saw them working there?

A. Oh, yes.

Q. What other work was being done, what other things were being done by the ship's officers or crew from what you observed during that week?

A. Well, in the engine room that is all they were doing, working on the diesel engines.

Q. Now, did you make any preparations with reference to the work to be done before you came there that Saturday?

A. Oh, yes.

Q. When did you start making your preparations?

A. Well, on the Friday afternoon.

Q. Friday afternoon? That is September 28, 1951?

A. Yes.

Q. That is the day before you actually did the work?

A. Yes.

Q. Who was present at the time when you were making these preparations?

A. Well, everybody was there that had been working there all week.

Q. When you say everybody—

[fol. 85] A. From the Rodermond Industries, the ship's crew, the general working conditions.

Q. You mean there are people who are working for Rodermond Industries, the shipyard people?

A. Yes, sir.

Q. And there were members of the crew doing work on the vessel?

A. Yes, and my own men.

Q. Which one of your own men did you have? Other men besides Mr. Halecki?

A. Oh, yes, there were a couple of others besides Halecki and myself.

Q. Now, in the time when you were making these preparations were there any officers on the ship present?

A. Well, they were aboard.

Q. Was the chief engineer around at the time when you were making these preparations for your work that Friday afternoon?

A. He was in the engine room, yes.

Q. And he saw what you were doing? He was right there?

A. Well, he was there. I don't know if he saw me or not.

Q. But you were working right there in the engine room?

A. Yes.

Q. That is the same engine room where you were making your preparations?

A. Yes.

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DONALD CHRISTIE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Christie, what is your position?

A. Personnel manager.

Q. And that is with what company?

A. Rodermond Industries.

Q. Did you, pursuant to a subpoena served on Rodermond Industries, produce some records concerning the repair work to be done on the vessel New Jersey?

A. I have them here, sir.

Q. In September 1951?

A. I have them here.

Q. You have them here?

A. Yes, sir.

Q. Have you a specification of repairs with reference to this vessel for that period?

A. I have.

Mr. Baker: May I see that, please?

(Witness hands to counsel who examines.)

Q. What is the date of this list of repairs?

A. September 24, 1951.

Q. And that is with reference to what vessel?

A. New York and New Jersey Pilots Association Pilot Boat New Jersey.

Q. And with reference to this list of repairs which you have produced here—withdraw that question.

Was that list of repairs for this vessel as between Rodermond Industries and the New York & New Jersey Pilots Association?

A. It is.

Mr. Baker: I offer that in evidence.

(Marked Plaintiff's Exhibit 6.)

The Court: What exhibit is that?

The Clerk: 6.

Q. Is that similar to the same one marked Exhibit P-5? Could you tell us by comparing them?

A. Yes, that is the same.

Q. Same one?

A. Same one, a duplicate copy, yes.

Q. How, customarily, are these lists of repairs prepared and submitted?

A. Well, as far as I know, the Pilots Association sub-[fol. 87] mits it to the company and the company prices them and works accordingly, if the bid is received.

Q. Does the shipyard inform the Pilots Association or the owners of the vessel?

A. As far as I know, no.

Q. How is that done?

The Court: He just told you.

Mr. Baker: Yes.

A. They have their repairs.

The Court: In other words, they prepare the list of repairs which they believe are required for the vessel and submit it to you and you price each item?

The Witness: That's right?

The Court: And that is what this reflects?

The Witness: That's right.

The Court: In other words, you picked up the repairs as submitted by them and your company, Rodermond Industries, specified the price?

The Witness: Yes.

The Court: And they accepted it?

The Witness: Yes.

The Court: And you went ahead with the job?

The Witness: Did the job.

Q. These pencil marks on this Exhibit 6—what are those figures?

A. Those are the prices for each item.

Q. I see. And then there is a total set forth for the amount, the total amount?

A. I believe that is it, yes.

Q. And then subsequently was there a bill submitted by you or Roderman* (sic) Industries to the owners of the vessel, New York & New Jersey Pilots Association?

A. I believe that is the procedure.

[fol. 88] Q. Have you got the bill there?

A. I don't believe so.

Q. Is this the bill (submitting)?

A. That is the bill.

Q. And that is the bill which was submitted under date of December 31, 1951, is that right?

A. That's right.

Q. And that is submitted by you to the New York & New Jersey Pilots Association?

A. Yes.

Mr. Baker: I offer that in evidence.

Mr. Mahoney: No objection.

Mr. Baker: No objection.

(Marked Plaintiff's Exhibit 7.)

Q. With reference to any of this work that is listed in these last two exhibits—was any of it subcontracted out by the Rodermond Industries to another company, if you know?

A. I believe so.

Q. Was the electrical work subcontracted out, as far as you know?

A. Yes. We don't have any electrical workers.

Q. You don't have electrical workers. So that you subcontracted it?

A. Yes.

Q. And to what company did you subcontract it? Can you find that out from your records?

(Witness examines.)

A. K & S Electrical Company.

Q. Do you know if you have a written contract with the K & S Electrical Company?

A. That I don't know. That would be in the office.

Mr. Baker: That's all.

[fol. 89]

Cross examination.

By Mr. Mahoney:

Q. Mr. Christie, were you employed by Rodermond in 1951?

A. Yes.

Q. Do you have any direct knowledge of this transaction with the Pilots Association?

A. None at all.

Q. No knowledge of your own, is that right?

A. No.

Q. These various exhibits which you have identified were all prepared by Rodermond, were they not?

A. The copies I have, yes.

Mr. Mahoney: Thank you, that's all.

Mr. Baker: That's all.

By the Court:

Q. You were given, as the Rodermond Company was given, of course, access to the vessel on which the work was to be done?

A. Yes.

Q. You had to get on the ship in order to do that?

A. Yes, we had to get on there in the yard.

Q. And at the time the K & S Company was authorized too?

A. Yes.

The Court: That's all.

DONALD DOIDGE resumed.

Direct examination.

By Mr. Baker (continued):

Q. Before we continue with your questioning from where we left off after the morning recess, this vessel, the New Jersey, was it, docked on a drydock or was it in the water?

A. It was in the water.

[fol. 90] Q. And it was off a pier, did you say? Which pier was that?

A. It was on the street side, on Henderson Street.

Q. Which water was it in, do you know?

A. In what is known as Morris Basin.

Q. That is Jersey City?

A. Yes, part of the Hudson River.

Q. And to get on the ship—how did you get on the ship?

A. From a gangplank from the street side.

Q. In other words, it was docked against the dock and you got on through a gangway?

A. That's right.

The Court: Mr. Mahoney, is there any question but what this vessel was in navigable waters?

Mr. Mahoney: I think not, sir.

Mr. Baker: All right.

The Court: And you agree that the general maritime law prevails?

Mr. Mahoney: There is no issue there, sir.

Mr. Baker: All right.

Q. You were telling us about the two air hoses which you brought for the vessel and the uses which were made of these air hoses. What else did you bring aboard the vessel on the preceding day, namely, a Friday, before September 29, 1951?

A. Besides the air hoses I took a high compression blower on board.

Q. And this blower, I understand, was a blower which belonged to Rodermond Industries.

A. That's right.

Q. And you brought it aboard the vessel that preceding Friday?

A. Yes, sir.

Q. Will you describe this blower to this Court and the jury as best you can.

A. It is a blower. It has a motor on one hand with a propeller that turns over 35,000 rpm, revolutions per minute, [fol. 91] heavy pressure blower, and then it is shaped like a funnel, something like a megaphone.

Q. Is it a portable one, that you carry?

A. It is a portable, yes.

Q. Can you give us the dimensions, approximately?

A. Well, I would say it is approximately 4 feet long and maybe 18 inches in diameter and it is very heavy. It takes two men to lift it.

Q. And you and who—

A. And Walter Halecki.

Q. Brought it aboard the vessel?

A. That's right.

Q. The Friday preceding?

A. That's right.

Q. How is that operated, in what manner?

A. It was plugged into an electric circuit on board.

Q. Did you plug it in that Friday?

A. Well, ~~up~~, we plugged it in when we were ready to use it.

Q. When you got ready to use it?

A. That's right.

Q. Did you place it in position the preceding Friday?

A. Yes, I did.

Q. With reference to its capacity—did you give us its capacity?

A. No. I have no idea of the capacity of it, sir, no.

Q. The position in which you placed it—how high was it above the engine room floor?

A. I would say about 7 to 8 feet. I didn't measure it. That is just a guess.

Q. Did you say you tied something to the rail?

A. I tied the blower to the rail.

Q. And how did you do that?

A. Just with rope around the handrail, around the top of the engine room.

Q. Could you give us the dimensions of that engine room?

A. I never measured it but I would say approximately 40 feet by 30 feet, maybe—40 feet long, fore and aft, 30 feet wide, approximately.

[fol. 92] Q. And how high would you say that engine room was from floor to ceiling?

A. From the lower engine room?

Q. Well, that engine room that is involved here.

A. Yes?

Q. From the floor to the ceiling, how high is it?

A. I would say approximately 18 feet.

Q. So that the position in which you placed this blower, as you described it, was 7 or 8 feet above the floor. It would then be, would you say, about 10 feet below the ceiling?

A. That's right.

Q. With reference to the engine room that we are discussing—is that what is known as a lower engine room?

A. Yes, sir.

Q. And with reference to that engine room, what was the ventilation that was part of the ship?

A. Well, they had two electric blowers, port, and star-board. They were both blowers for the engine room.

Q. And where were those blowers located with reference to the part of the engine where they were located?

A. They had ducts, a series of ducts running around the engine room—around the rails and underneath the catwalks.

Q. And where would the exit or the outside portion of the ducts be, in what part of the vessel?

A. Well, they went all the way through the deckhead to the outside air.

Q. I mean, where were they, in the ceilings or in the walls or in the floor?

The Court: He just described where they were, didn't you?

The Witness: Well, I don't know whether he means the fresh air coming in or the outlets from the duct.

Q. The outlets, that's the word I mean, the outlets.

A. The outlets from the duct? Well, as I say, on the [fol: 93] lower engine room, on the ceiling, underneath the catwalks, over the diesel engines.

Q. So were they all in the ceilings, all the outlets?

A. Yes, sir. There might have been some in the upper engine room. I don't know for sure.

Q. I am talking about this particular engine room that is involved here where the cleaning of the generators would be done.

A. That's right.

Q. So that they were all in the ceilings, these outlets?

A. Yes, sir.

Q. And this ventilating system which was part of the vessel—did that exhaust the air or did that put air into the engine?

A. I think it put air into the engine.

Q. Was there anything else in that room that you could describe to us further? You have told us about the duct system with the ventilation. What other ventilations were there in that room before you started doing your work, before you started setting up your work?

A. Well, there were a couple of oscillating fans around a strategic location for the crew.

Q. Were any of those fans in use at the time you were doing your work?

A. Well, I took one and put it on the floor alongside of where we were working, at the generator, one oscillating fan.

Q. And will you describe this fan to us, in size.

A. It is just like a regular house fan. I would say it was a 12-inch blade. It might have been 14.

Q. And what did that fan do while you were working?

A. Well, it kept blowing. As you were working it kept blowing the fumes of the carbon tet away from you where you were spraying.

[fol. 94] Q. Just a regular door?

A. Yes, a little narrower than a house door.

Q. What else did that room have, this lower engine room if there was anything else in reference to its ventilation?

A. Nothing that I can recall.

Q. That is all you remember?

A. Yes.

Q. We have a number of photographs here. I am going to ask you whether or not—well, first of all, does that indicate the vessel, the New Jersey, the one that you did your work on?

A. That is it.

Mr. Baker: I will ask that it be marked in evidence.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 8.)

Q. Looking at these other photographs, could you select one of these photographs so that we could point out to this Court and jury to show us just where you tied onto this lower end, as you described—you tied it onto a rail and placed it in that engine room?

A. This is it right here (indicating).

Q. This one here?

A. Yes, sir.

Q. Does this photograph indicate the vessel, the New Jersey, the engine room of the vessel on which you were doing the work? Is that a true representation of the vessel as it existed at that time?

A. That is right.

Mr. Baker: I offer it in evidence.

(Plaintiff's Exhibit 9 received in evidence.)

The Court: That is a picture of what?

Mr. Baker: That is a picture of the engine room.

The Witness: The access ladder in the engine room.

[fol. 95] The Court: I think you ought to put an arrow here showing where it is going.

Mr. Baker: I will.

Q. Will you put an arrow and show us where the steps are and where they go down.

A. Yes, this is the stairwell, the ladder.

The Court: You can't see the steps of the ladder?

The Witness: No, just the hand rails at the top of the ladder.

The Court: Put an arrow indicating there are steps going down and those steps lead to what you term the lower engine room? Is that right?

The Witness: Yes, sir.

Q. This is an arrow which points to the steps going down. And where was the railing that you placed this blower?

A. It was right in here, in this corner.

The Court: Right in the corner. Would you put an arrow on the railing where you tied on this blower?

The Witness: It is right here, and then from here also.

Q. So you put two arrows to the two parts of the railing where you tied this on?

A. Right in this circle here.

The Court: Would you stand up and demonstrate to the jury and pass the photograph along to the jury.

First of all, what is in this photograph which is marked Exhibit 9? What is this plate here?

[fol. 96] The Witness: This is the catwalk around the upper engine room where this steel plate is.

Q. And that is about how many feet above the floor?

A. I would say about 8 feet above the lower engine room.

Q. And the lower engine room is down below here?

A. These two rails are handrails on the ladder that goes

down and the blower was fastened in the corner of these two rails here where it was shooting down into the engine room.

Q. The stationary rail is where you attached the blower?

A. That is right.

Q. And the blower was facing down into the engine room?

A. Yes.

Q. And the generators were down below on the floor?

A. That is right.

Q. Down below?

A. Yes.

Mr. Baker: I would like with the permission of the Court to pass this on to the jury.

The Court: Yes.

(Plaintiff's Exhibit 9 shown to the jury.)

Q. Now, with reference to the generators which were to perform this work, can you from this group of pictures pick out the photographs which would show those generators so that we can present it to the Court and jury?

A. This one is the main generator here, is the best picture of it. Of course, here is one which is attached to the diesel engine that drives it.

Q. Are these both pictures of the generators which were involved at the time when you went in there in September of 1951 on this vessel?

A. Yes, sir.

[fol. 97] Q. That is a true representation of those generators?

A. Yes, sir.

Mr. Baker: I offer them in evidence.

Mr. Mahoney: No objection.

The Court: Let me see Plaintiff's Exhibit 9, please.

(Plaintiff's Exhibits 10 and 11 received in evidence.)

Q. Now, would you mark on Exhibit 10 with a large letter G the generators on which the work was being done? And also would you mark on Exhibit 11 with a G the generators on which the work was being done?

A. Yes.

Q. Could you tell us the size of these generators with reference to the measurements, approximate measurements?

A. Well, I think they are about four foot high and in length they were about five foot. I really can't say for sure now.

Q. Where were they placed? On the floor or above the floor of the engine room?

A. They were slightly below the floor.

Q. Below the floor?

A. Maybe about six inches.

Q. They were set into the floor?

A. Yes; there was a regular bed for them, a bedplate where they were bolted down.

Q. And they are round? Circular?

A. Yes.

Q. Are these the generators which you were to clean with carbon tetrachloride?

A. Yes, sir.

Q. That is the work that was being done on this day?

A. That is right.

Mr. Baker: I would like to pass this on to the jury, with your Honor's permission.

[fol. 98] Q. Now, with reference to some of these other photographs here could you select a photograph here which would show the ship's ventilating system as to where the outlets were? The photograph which would best show it.

A. Well, these all show part of it.

Q. All right. Now, these all show part of it?

A. Yes.

Mr. Baker: I will offer these four pictures in evidence.

(Plaintiff's Exhibits 12, 13, 14 and 15 respectively received in evidence.)

The Court: You did not mark the ship's ventilators here, did you?

The Witness: Not yet, sir.

Q. Now, looking at this exhibit marked Exhibit 12, what does that represent first?

A. Well, this is the lower engine room.

Q. Lower engine room?

A. Yes.

Q. What part of the lower engine room does it show?

A. Well, it is from the ladder looking forward alongside of the main engine.

Q. Is it a picture of the ceiling?

A. Yes.

Q. With reference to the ship's ventilating system could you mark a V the ship's ventilating outlets, with a large V.

A. There is one here.

Q. Mark it with a V.

A. And there is one also here on this one. There is one under here that is barely visible, right here.

Q. In other words, you have marked in this photograph, Exhibit P-12, with a V three outlets of the ship's ventilating system?

A. That is right.

Q. Are they all in the ceiling?

A. Yes, sir.

[fol. 99] Q. And with reference to those two outlets, are they in round shape?

A. Yes, except the one coming over the side. This is just a square duct that opens up.

Q. In other words, one of them shows a square duct. Will you stand up and face the jury and show them the ventilating outlets and then we will pass them on to the jury.

A. This here is the square duct that runs along the ceiling of the lower engine room and this round rosette thing is the outlet for the air. There is another one back here and then on the end here there is just a square duct where it opens up and blows down on the side.

Q. That is all in the ceiling of the engine room?

A. Yes, that is one section.

The Court: Have him mark the duct and the outlet.

Mr. Baker: Yes.

Q. Mark D for duct and put an O for outlet.

A. This would be an outlet here, and, of course, this is a duct with an outlet here, too.

Mr. Baker: Put a D for the duct again and an O for the outlet.

Q. Now so we won't get mixed up on this, I see before you had a V and you have changed that to a D and an O. The D is for duct and the O is for outlet?

A. That is right.

Mr. Baker: With the permission of the Court I will pass that on to the jury. Hold that for a moment until I get some of these photographs explained.

[fol. 100] Q. Here is Exhibit 13. Mark that the same way, D for duct and O for outlet. We are talking now about the ship's ventilating system.

A. Well, there is a series of ducts. This is a duct here. That is also one.

Q. Where is the outlet?

A. There is no outlet shown on this. This is just the ducts going down into the engine room.

Q. What part of the engine room does that picture, Exhibit 13, show?

A. This is the upper part, the upper engine room. This is on the after end of the engine room.

Q. Is that where the work was being done?

A. Yes, and this is right above it.

Q. So this exhibit 13 does not show any outlets at all?

A. No, it just shows the duct going down.

Q. Now, the next exhibit is 14. Will you mark D for duct and O for outlet in that photograph?

A. There are no outlets here. This is also the main duct going down from the outside.

Q. Mark that with a D. Put down MD, meaning main duct.

A. This one supplies all the air for either the port or the starboard blower, motor. That comes down from the outside and then distributes inside the engine room. This is also one of the ducts.

The Court: I am not clear. Does that feed air into it or does it draw air out?

A. It feeds air in, sir.

Q. What part of the engine room would this Exhibit 14 be that you just marked? Is that the lower engine room? The middle? Or the top?

A. No, this is the upper engine room.

Q. Are there any outlets in that picture which we have [fol. 101] just marked, Exhibit 14, or were they all ducts?

A. These are all ducts here.

Q. Now, the next photograph you have taken is Exhibit 15. Would you mark that with a D for the ducts and an O for the outlets?

A. This one, it just shows one outlet.

Q. Mark that with an O.

A. This is, of course, all duct work.

Q. Now, what part of the engine room was this photograph, Exhibit 15, taken of?

A. This is lower engine room.

Q. That is the lower engine room?

A. Yes, sir.

Q. And this duct that appears, is that also in the ceiling of the engine room?

A. Yes, sir.

Q. Just the one duct?

A. That is right.

Q. It is near the ladder, I see.

A. Yes, sir.

Q. Is that ladder the ladder which you have shown us before as going out of the engine room?

A. I think it is, the one going up to the top or upper engine room and outside.

Mr. Baker: With the permission of the Court may I pass these to the jury?

The Court: Yes.

(Exhibits shown to jury.)

The Court: May I see those exhibits?

Mr. Baker: Yes, surely.

Q. Now, coming to Saturday morning, that is, September 29, 1951, will you tell us just what time you arrived on the vessel.

A. Well, I got down there about, I would say, about ten or fifteen minutes past eight in the morning and Walter was there waiting for me when I got down with the truck.

[fol. 102] Q. You mean Walter Halecki?

A. That is right.

A. Yes, I brought three gas masks down there on Saturday morning.

Q. Are they alike, the three gas masks? Are the three of them alike?

A. The gas masks themselves are what they call Army surplus. ~~It is regular Army gas masks.~~

Q. And they belong to your own firm?

A. K & S Electric, yes.

Q. And you brought that aboard the vessel that Saturday morning?

A. Yes, sir.

Q. Did each of you use a gas mask?

A. Yes, sir.

Q. Now, will you describe this gas mask as best you can, these gas masks that you brought on and used that morning.

A. Yes. Well, it fits very tightly over the nose and the mouth, and then it has got a strap about the back of the head which holds it very tight and there is a hose that comes down to a cannister in a canvas bag that is strapped around your waist with a belt to hold it there, and you breathe through that all the time.

Q. And you breathe through that?

A. Yes.

Q. That is, these cannisters which are in these gas masks?

A. That is right.

Q. Like a knapsack, is it? Or can you describe it?

A. In a way, yes.

Q. Is that the same general type of gas mask that you used before?

A. Yes.

Q. You used that before?

A. Yes.

Q. That is the same general gas mask that you used before in the work you did similar to this type of work?

A. Yes.

[fol. 103] The Court: I think we will take our mid-afternoon recess.

(Short recess.)

Q. Would you tell us, then, the procedure, the way you started your work? About what time did you start your work that morning, September 29, 1951?

A. We started approximately 8.30 in the morning.

Q. Is that when you started to do the spraying?

A. No, that is when we started to set up all the paraphernalia, you might call it.

Q. When did you start to do the spraying?

A. I would say approximately a quarter to nine, nine o'clock.

Q. That morning?

A. Yes.

Q. And who was on the vessel other than you and Mr. Halecki, that Saturday morning?

A. There was only a watchman.

Q. A watchman for the vessel?

A. That's right.

Q. And did you see or talk to that watchman?

A. Yes.

Q. And what did you say to him and what did he say to you?

A. Well, when I saw him on there I would just pass the time of day and then, of course, I warned to stay out of the engine room and we were going to do the spraying.

Q. And you started the spraying about a quarter to nine or nine o'clock?

A. That is right.

Q. Will you tell us the procedure that you pursued when you started this spraying? How did you do that?

A. Well, we have the air and everything on. The spray gun is attached to one of the air hoses. The spray gun itself has a suction hose that went down into the can of carbon tetrachloride, forming a suction and spraying into the generator coils and the armature.

[fol. 104] Q. Where was that can kept?

A. Well, we kept it close to the job where you were spraying because it only had—

Q. Was it on the floor, or outside?

A. On the floor, yes.

Q. On the engine room floor?

A. Yes.

Q. And was the can open?

A. Yes.

Q. And you had it attached so that it went through the hose?

A. That's right.

Q. Tell us just what went on there?

A. Well, the hose from the spray gun goes right into the can and wherever you move, there was only about three foot of hose on it, and whenever you moved you had to move the can with it. So we started spraying, as I said, about nine o'clock, maybe, and we sprayed for about maybe ten, fifteen minutes and then we would go up on deck or maybe up in the messroom.

Q. How do you alternate with reference to this spraying? How long are you downstairs spraying into the engine room?

A. Well, there is one thing I think I ought to say here first. On the Friday before I personally had been helping the men lifting the motor in. I sprained my wrist on my right hand. So when I started to work I found out that my wrist wouldn't let me hold a gun or press the trigger on the gun, on the spray gun. Therefore, I started but I couldn't do it. So Walter told me that he would take over and do the spraying if I would just help him move the stuff around.

Q. Well then, did you go down into the engine room and start this spraying?

A. Yes, I did.

Q. And for how long a period of time did you spray?

A. Oh, I don't think I was spraying two or three minutes because I couldn't do it.

Q. So that outside of the starting for two or three minutes; you did no spraying in the engine room?

A. That's correct.

[fol. 105] Q. So that Mr. Halecki was the one who did the spraying?

A. That's right.

Q. He sprayed for how long a period of time before he went out of the engine room?

A. Well, I would say from 10 to 15 minutes.

Q. And then he came out of the engine room?

A. Yes, sir.

Q. And he stayed out how long?

A. About the same amount, 10, 15 maybe 20—I don't know.

Q. So he sprayed a while and then he was out of the engine room?

A. Yes.

Q. And then he went back again?

A. That's right.

Q. You alternated that way?

A. Yes.

Q. During the time that he was spraying in the engine room, you stayed on top of the deck?

A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room.

Q. During the period of time that he was doing the spraying, during that day, did he wear a gas mask?

A. Oh, yes.

Q. He wore it at all times?

A. Yes.

Q. And that is the gas mask that you have described?

A. That's right.

Q. When did he complete the work of spraying? About what time was it that the spraying stopped?

A. Well, we stopped for lunch at 12 o'clock and then we started in again at 12.30 or going on one, and I think we worked through until about, I think maybe 3 or 3.30 that afternoon.

Q. And was the job finished then?

A. Yes.

Q. At 3 or 3.30?

A. Yes.

[fol. 106] Q. Then what was done?

A. Well, we just shut everything off and left.

Q. You left the vessel?

A. Yes, sir, we disconnected the air hoses and threw them back in the engine room.

Q. When he left the vessel—I am talking about Mr. Halecki—did he say anything to you with reference to anything concerning his condition at that time?

A. The only thing, when I was leaving him, we were up on the street, and the only thing he said to me was that he had a peculiar taste in his mouth, but that is the only thing that was said.

Q. What did he do after that, of what you know?

A. He left me right there and then. I went home and he was either going home or going to his mother-in-law's—I don't know which.

Q. Did you see him again or was that the last time you saw him?

A. No, I saw him in the hospital after.

Q. Before this date of September 29, 1951, when you worked with him for some time, you say, was he in apparent good health?

A. Yes.

Q. Was there anything wrong with him of any kind?

A. I don't think he ever lost a day.

Q. Did he work steady?

A. Very steady.

Q. How was he with reference to being sober? Was he sober or not on the job?

A. I never seen him take a drink. Of course he was like any man, he would like to take a drink once in a while, like any man, but in the approximate six years I knew him I never saw him under the influence of liquor or anything else.

Q. Was he sober on the job?

A. Very, very.

Q. And was he sober on the job on the day when this took place, September 29, 1951?

A. He sure was.

Q. During the course of the time when you were on this vessel, for the week before that, September 29th, did [fol. 107] you consult with anyone from the vessel concerning the work which you were doing on board the vessel?

A. Well, we have to consult with them from time to time as the work progresses.

Q. Whom did you consult with in behalf of the vessel?

A. If I am doing work in the engine room I have to consult the chief engineer on the ship.

Q. And did you consult with him?

A. About what, sir?

Q. I mean during the course of the work, the work that was being done by your company.

A. Oh, yes.

Q. And was the work being done under the supervision of the chief engineer, as far as the engine room was concerned?

A. Oh, yes.

Q. And if he disapproved of any of the work that you were doing or the members were doing—

A. It had to be done to his complete satisfaction.

Mr. Mahoney: I object to that last.

The Court: Sustained, as to the last question.

Q. With reference to the carbon tetrachloride which was used on this job, I think you said you knew it was a dangerous chemical.

A. Yes.

Q. Had you used that before this particular day?

A. Yes, from time to time.

Q. When did you use it? On this occasion would you use it or under what occasion would you use carbon tetrachloride for this type of work, cleaning generators?

A. Always for cleaning motors or generators.

Q. Would you use it when it was specified?

A. Oh, yes.

Q. Was there anything else that was used other than carbon tetrachloride?

A. Well, there is, yes.

Q. And since this date have you used carbon tetrachloride?

A. Oh, no.

[fol. 108] Q. Never used it again?

A. No, sir.

Q. And before September 29th, 1951 were there occasions when you used substitutes for carbon tetrachloride?

A. Occasionally we had, yes.

Q. And if there was no specification of carbon tetrachloride in the specifications for the work to be done, would you, under those circumstances, use the substitute?

Mr. Mahoney: Objection, please, as speculative.

The Court: I will allow it.

A. Yes. If there was no particular specification? In fact, I can put it this way. In some specifications they read "Carbon tetrachloride to be used or its equivalent."

The Court: Prior to September 29, 1951 you did use carbon tetrachloride?

The Witness: Oh, yes.

The Court: You used it generally, did you not, for the cleaning purposes?

The Witness: Yes.

The Court: Whether or not it was specified?

The Witness: Not always.

The Court: Was there any time when it was not specified?

The Witness: That could be, sir.

The Court: All right.

Q. But was it a general rule, as a matter of practice in the work you did, if it was not specified in the specifications—namely the use of carbon tetrachloride to clean the generators and so forth—would you use a substitute for carbon tetrachloride?

A. Wherever it was possible, yes.

[fol. 109] Q. And that would be a safe chemical?

A. A lot safer than carbon tet.

The Court: Are there any other questions?

Cross examination.

By Mr. Mahoney:

Q. Had you, for example, used carbon tetrachloride for cleaning generators in a factory, perhaps?

Mr. Baker: I object, there is no materiality in this case.

The Court: Overruled.

A. When you come right down to it, there is a lot of difference between doing it in an engine room and doing it in a factory, doing it in an engine room on a ship.

Q. Had you ever used it in a factory anywhere on shore before this occasion?

A. That I don't know for sure. I don't know for sure.

Q. Do you think it is likely that you did, though?

A. It is possible, yes.

Q. And in such a place, wherever it may be, a factory or a building, would they customarily be equipped with any sort of overhead blowers or ventilation system built into the building?

A. There is no comparison, sir, between the two.

Q. As far as you know today, can you assemble all of this work properly, in your opinion?

A. Yes.

Q. There is no doubt in your mind it was operating properly, assembled properly, is that right?

A. Yes.

[fol. 110] By the Court:

Q. What was the basic function of the air hoses?

A. One was to operate the spray gun for the carbon-tetrachloride and the other one we tied underneath the generator where we were spraying to blow the spray from the man who was spraying with the gun.

Q. Then in part it was used as a ventilating system or a ventilating method?

A. Part of it, yes.

Q. And what was the basic purpose of the blower system?

A. To stir up the air in the engine room, to blow it around.

Q. Well, again, it was used for purposes of ventilation?

A. Yes, sir.

Q. And did you use anything else for ventilation purposes?

A. Well, this portable blower that we brought ashore, as I say, was tied on the rail. It was an exhaust blower and it

was blowing out of the door, sucking the foul air from the lower engine room, supposed to be blowing it out the door.

Q. And in addition to that, you had electric fans?

A. Electric oscillating fans, yes.

Q. And when you started to work that morning were you satisfied in your own opinion that this was adequate ventilation for the men to work with carbon tetrachloride?

A. Well, sir, I am not an engineer but I was satisfied it was sufficient.

Q. You were satisfied it was sufficient?

A. That's right.

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Q. On the day you started the work, you brought certain equipment on there that belonged to your own employer, is that correct?

A. Yes.

Q. And I think that equipment included gas masks?

A. That is right.

Q. And they were the property of K & S?

A. Yes.

[fol. 111] Q. Was it customary to use gas masks in doing the type of work you were doing?

A. Oh, yes.

Q. And you had used these same masks on occasions before this?

A. Yes.

Q. How long before this particular day had it been since you had used these masks?

A. That is hard to say now, sir. I don't remember.

Q. Well, can you give us a rough estimate? Was it a week or a month?

A. Probably a month to six weeks.

Q. Was it in your practice to inspect these masks between jobs?

A. Yes, we check them.

Q. Did you check them before this job?

A. I sure did.

Q. How did you test them to see whether they were all right?

A. You can breathe into them. There is a kind of a taste.

I don't know whether you call it a taste or a smell, when they are foul. Then you change the cannister on them.

Q. What is this cannister, please?

A. Well, it is just like a can. It is filled with some kind of substance, I don't know exactly what it is. It is like charcoal and other stuff that purifies the air that goes through it.

Q. And the efficiency of the gas mask depends upon the cannister, to a great extent, does it not?

A. That is right.

Q. And the efficiency would depend on how often the cannister was changed, for example?

Mr. Baker: I object to that unless he knows, as an expert on gas masks.

The Court: Well, he said he has worked with them for a period of time. You have already indicated you would know whether a gas mask is functioning properly, is that right?

The Witness: I think I do, sir. Maybe I was proven wrong, I don't know.

[fol. 112] Q. My question was, Mr. Doidge, do you feel, from what you know of that particular type of mechanism, that the efficiency of the mask depends to some extent on how often the cannister is changed?

A. Yes.

Q. Do you happen to know how frequently this cannister was changed in this particular mask?

A. No.

Q. Did you change them?

A. When we changed, we changed the three at once.

Q. I see. Do you remember when the cannister had been changed before this day?

A. No, I couldn't remember that now.

Q. I see. You did not change it that day, anyway?

A. Oh, no, no.

Q. Or within the prior week, perhaps?

A. No. In fact, I know I did the job prior to that with the same masks.

Q. I see. Did they operate all right at that time?

A. Yes.

Q. When you did this work on that particular day, you

were in and out of the engine room frequently, I understand?

A. Oh, yes.

Q. And, as a matter of fact, for at least the first part of the job you were down there constantly?

A. For the first part, maybe a half hour—no, let's see—about an hour and a half.

Q. And after that you were up and down?

A. That's right.

Q. Actually the work, even as done by Mr. Halecki, was intermittent, wasn't it?

A. Yes.

Q. Was it your practice to work for fifteen minutes and knock off for a while? It was, wasn't it?

A. That is right.

Q. So both you and Mr. Halecki were up and down, is that right?

A. Yes.

Q. When you went down there and you worked, did you [fol. 113] wear a mask?

A. Most of the time, yes. Once in a while I went down there and take a quick look around without it on.

Q. But if you went down to move anything?

A. Then I would put it on.

Q. You would use a mask. And did the decedent have his mask on most of the time, as you recall?

A. All the time. As he was down there, as I said, most of the day when there was any work to be done, he kept it on.

Q. You never saw him without the mask, did you?

A. No.

Q. Where would you and Mr. Halecki put your masks when you knocked off for a while?

A. I don't remember exactly where we put it but I think sometimes we left it in the galley when we came up the ladder on the forward end, I think it is, and left them in the galley, right at the top of the engine room stairs.

Q. Then, when you are going down, you put them on, is that right?

A. Put them on right after that point.

Q. Did you see the decedent do the same?

A. Yes. In fact, we had the three of them laying there.

Q. Did he always use the same mask?

A. No, there was no way of telling. We just grabbed one as we went down. He might have been wearing mine and I might have been wearing his, or used various ones at different times.

Q. You might have worn all three during the day?

A. That's correct.

Q. So you might have had a mask on or off, and he had one off, or vice versa?

A. That's right.

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Q. I show you a picture, Mr. Doidge, and ask you if this is a fair representation of the skylight or overhead opening [fol. 114] on the pilot boat New Jersey?

A. That is right, yes. Of course, these were wide open on the picture.

Mr. Mahoney: I would like to offer these.

Mr. Baker: Was that the upper or lower engine room?

The Witness: No, that was right in the ceiling, at the top.

Mr. Baker: No objection.

(Marked Defendant's Exhibit B.)

By the Court:

Q. These lead right down to the engine room where you are working?

A. All over to one side, sir.

By Mr. Mahoney:

Q. Mr. Doidge, will you point out to the jury the part of the picture which represents the ventilator or skylight which leads directly to the engine room, please?

A. This whole thing is the skylight, as far as that goes.

The Court: The part that is open?

The Witness: The part that is open, yes.

The Court: Pass it to the jury, please.

(Handed to the jury who examines.)

The Court: That means really that what you have there for ventilation was the air hoses, the blower system, the

openings in the ducts, the fans, the door leading out into the open and the skylights?

The Witness: And the portable blower.

The Court: And the portable blower.

The Witness: Yes.

[fol. 115] Q. Just one more question, Mr. Doidge. Is it your opinion that the ventilation on the boat was adequate on the day you worked there?

A. As far as I am concerned, it was, at that time, anyway.

Mr. Mahoney: That's all.

Redirect examination:

By Mr. Baker:

Q. The door leading to the open—how high is that above the deck?

A. Above what deck, sir?

Q. Above the deck of the engine room.

A. Oh, approximately nine foot, eight, nine foot.

Q. That is the lower part of the door?

A. Yes.

Q. In other words, the lower part of the door is about nine foot above the deck of the engine room?

A. Yes.

Q. You were talking about the difference with a factory job. What is the difference between work in the factory and work in this low engine room in this ship?

A. Well, usually in a factory or in a place of business like that, you have much more air space. You have windows all around you and you have higher ceiling space.

Q. It is not confined like in the engine room?

A. That's true, there is no comparison.

Q. Was this a confined area, this engine room?

A. Well, definitely.

Q. You told us a little while ago, in response to the question of counsel, concerning whether you thought it was adequate ventilation, when you went upon that job, what you thought. Do you now think it was adequate ventilation?

A. No, I don't naturally.

Q. If anything of this substance got on your hands, it didn't affect you, did it?

A. No. Well, it dries the skin, but only for a short time. [fol. 116] Q. You didn't have anything after effects?

A. No.

Q. In using or handling this carbon tetrachloride?

A. No.

Q. As far as you were concerned. And you personally don't know whether or not any part of it touched his hands, as far as you personally are concerned?

A. No, I wouldn't know, not for sure.

Q. With reference to the work which you are doing, you knew, you told us, of the dangers of carbon tetrachloride, is that correct?

A. That is correct.

Q. And isn't it a fact that you spoke to the engineer of the vessel before you used it that Saturday? And did you talk to him about the danger of the carbon tetrachloride, the carbon tetrachloride?

A. He knew about it.

Q. You talked to him about it?

A. Surely. That is the reason we wanted the ship cleared.

Q. With reference to the preparation of these specifications, which is in Exhibit 5, which you used in the work which you were to do for your company—with reference to deciding what work was to be done and placed in these specifications, is that done by the ship or by the contractor, as far as you know? Who would tell that?

The Court: I don't see any point in that. He doesn't know and you had a witness who testified directly as to how it was prepared. Now why confuse the record?

Mr. Baker: It was just another question on it.

The Court: Do you have any other questions?

Mr. Baker: That's all.

The Court: Strict recross, please.

Mr. Mahoney: Yes.

[fol. 117] Recross examination.

by Mr. Mahoney:

Q. Mr. Doidge, there has been some reference to an upper and a lower engine room. Actually, wasn't it just one big room here?

A. Well, in a way, yes.

Q. This is one big room with a catwalk around, about half-way up, is that right?

A. No, because there is a certain section of the engine room which is on one side of the ship.

Q. But actually there were not two rooms, were there, just for clarification? There were not two rooms? It was just one big room?

A. That's right. The skylight was on one side.

Q. Mr. Doidge, just one point I would like to clarify. You told me and you told his Honor that in your opinion the ventilation was adequate at the time in question, is that correct?

A. Yes.

Q. Now you told Mr. Baker a moment ago that your opinion today is that the ventilation was not adequate?

A. I said there is a possibility. I don't know.

Q. I don't recall your using the word "possibility." What is your opinion today, Mr. Doidge?

A. Well, considering what happened, there could not have been enough ventilation to take all that stuff out of there.

Q. What occurred to change your opinion, Mr. Doidge?

A. The man died.

Q. Well, do you know why?

A. Of carbon tet poisoning.

Q. Do you know whether he absorbed it by inhaling it or do you know whether he absorbed it by touch? Do you know yourself whether the gas masks were defective or whether the ventilation system was inadequate?

A. I know the gas masks were not defective.

Q. How do you know that?

A. Because the Police Department checked them after it happened.

[fol. 118] Q. Did you receive a report from them? Did you check them?

A. Check what, sir?

Q. The gas masks?

A. Well, I was using them.

Q. Did you know of your own knowledge whether the gas masks were defective? Do you know of your own knowledge?

A. No, I couldn't know until after I got the report.

Mr. Baker: At this time, your Honor, I would like to offer in evidence the hospital records of the Jersey City Medical Center.

I have shown them to counsel.

Mr. Mahoney: Yes.

(Plaintiff's Exhibit 16 received in evidence.)

ANGELO GNASSI, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Dr. Gnassi, what are you connected with at the present time?

A. Jersey City Medical Center.

Q. And what is your position with the Jersey City Medical Center?

A. Chief pathologist.

Q. Doctor, did you make an autopsy of Mr. Halecki, the deceased in this case, at the Medical Center, Jersey City?

A. Yes, sir.

Q. And according to the hospital records, what is the final diagnosis?

A. Carbon tetrachloride poisoning, renal and hepatic failure.

[fol. 119] Q. What is meant by "renal and hepatic failure"?

A. That means the kidney failed to work and the liver failed to work.

Q. Doctor, did you perform an autopsy on this man after his death?

A. Yes.

Q. And will you tell us the date you performed it and the place where it was performed.

A. It was on October the 12th he died, 1951, at 3 o'clock, he died, p.m., and the autopsy was performed on the same day, at 5 p.m.

Q. And did you perform the autopsy, Doctor?

A. Yes, sir.

Q. And, Doctor, is the record on that autopsy also in these hospital records, attached to the hospital records marked Exhibit 16?

A. That's right.

Q. Doctor, you have your report there, have you not?

A. Yes, sir.

Q. What does it show as far as the final report which you submitted is concerned, with reference to your diagnosis as you made as a result of that autopsy?

A. Carbon tetrachloride poisoning.

Q. Is that your conclusion, Doctor?

A. Yes, sir. I have more than one conclusion.

Q. Go ahead. What is the rest of that?

A. Central necrosis of the liver.

Q. The central necrosis of the liver—

A. Yes?

Q. —was that due to the carbon tetrachloride poisoning, Doctor?

A. Yes, sir.

Q. Now, these various designations or findings that you have mentioned, Doctor, are they all related to the carbon tetrachloride poisoning which you mentioned at the beginning of your findings?

A. I believe so.

[fol. 120] Q. Well, in your opinion, with reasonable medical certainty, would you say that they are related to the carbon tetrachloride poisoning?

A. I have no doubt in my mind.

Q. Now, did you make a final conclusion as to the portions of the body which were affected by the carbon tetrachloride poisoning? I mean, using plain language so that the jury can understand it.

A. It is my belief that all the changes here were mentioned—the changes that were mentioned were due to carbon tetrachloride poisoning.

Q. And it affected principally what portions of the body?

A. Every change I mentioned was directly due to carbon tetrachloride poisoning.

The Court: That would be the liver, the kidney, the heart and the lungs?

The Witness: Yes.

The Court: And I think you mentioned the brain too?

The Witness: Yes.

The Court: You say the conditions which you described were all caused by carbon tetrachloride poisoning?

The Witness: Yes, sir.

ROBERT P. GAINES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where is your office located?

A. In the City of Bayonne.

Q. I called you Dr. Gaines. Am I wrong? Is it Mr. [fol. 121] Gaines?

A. Well, we have a Ph.D. in chemistry. The title really does not carry much weight.

Q. Well, what are you usually called? I want to know.

A. Well, it does not matter.

Q. What is your profession?

A. Bio-chemist with specialty in toxicology and public safety.

Q. Doctor, could you tell us first of all something about carbon tetrachloride?

A. Yes, I could.

Q. What is this substance and what is its effects and so forth?

A. I would like to know just at what level to place this. I don't know. But we can put it very elementarily and then go up, and if there is any confusion, it would be appreciated if I am stopped.

Q. Yes.

A. Chemically it is a member of the Methane series in organic chemistry, aliphatic series. It is a compound which has been substituted, in which the hydrogen atoms of methane have been substituted by atoms of chlorine, instead of the hydrogen, so it is the bottom member of this series. In other words, we could have a monochlor methane, a dichlor methane and trichlor methane, commonly known as chloroform, and the tetrachlor methane, or carbon tetrachloride. With respect to the physical properties—it is a liquid at ordinary temperatures, colorless, has a quasi-aromatic characteristic odor. It is about 1.54 in specific gravity, which means it is heavier than water. It boils at about 77 degrees Centigrade, so it is rather volatile. It has had quite a peculiar history as far as medicine goes. At one time it was believed to be of great help for elimination of worms from the alimentary tract, and was used in that respect as a medicine. Then it was found that the poor [fol. 122] patients received toxic results, and investigation showed that it was a toxic substance there and then. This use was eliminated and it became—for a while carbon tetrachloride was heard of very little until it was promoted as a fire extinguisher, especially where electrical devices are concerned, and the reason for it becoming very popular in that respect was the fact that it was a non-conductor of electricity, and so it became very popular.

But it was soon found that although the universal adoption of carbon tetrachloride as a fire extinguisher was quite popular and quite extensive, that in areas where it was used, confined areas, there was quite a number of poisonings. We knew very little about it, the mechanism of it at that time, and the theoretical approach to this situation was, perhaps a metal substance was acting as a catalytic agent, at high temperature, and the carbon tetrachloride striking these hot metal surfaces caused a break-

down of the compounds and gave off this phosgene, which had later become famous in its own nefarious way, the poison gas in World War I. But they attributed the poisoning by tetrachloride as attributable to the breakdown into phosgene. They did not consider carbon tetrachloride as being the poisoning agent. So the advocates of the carbon tetrachloride as the fire extinguishing agent put on their containers this warning: "To be used with adequate ventilation."

Research went on to see how much phosgene was created or generated, and it was found that very little phosgene was generated, that the poisoning effects were really due to the inhalations of the vapors of carbon tetrachloride.

There has been about the same time that this development took place—about the same time that this development took place it was found that carbon tetrachloride was an [fol. 123] real and economical and quite an efficient solvent for a number of industries, and especially where grease was concerned. That is, it would degrease, it would dissolve greases and fats without leaving any extensive damage or even any damage at all to the surfaces, and it was used that way in quite a number of industries, and even in the spotting industry—that is, in the laundry industry where cleaning of fabrics was done, and they had put out quite a few, spotless, and I think the popular, most popular was Carbona, which was nothing but carbon tetrachloride, and the lady folks and gentlemen would apply the Carbona to whatever fabric it was, and there was no harm at all because the area was extensive, the amount that was used was small. So carbon tetrachloride switched over from a fire extinguisher to that of a degreasing or solvent in use. As the uses of carbon tetrachloride became more prevalent in industry and in confined areas, it was found that a number of employees using the carbon tetrachloride in the degreasing operations would become ill and their first complaint was of nausea and gastric upset such as perhaps vomiting, and very little was understood about the toxicology of this substance at that time. So they started taking different precautions.

Q. When you say at that time, Doctor, about how many years ago was that?

A. About 1935—1930—'35.

Q. About 20 years or so ago?

A. Yes. Then it was found that the carbon tetrachloride could be used in industry providing adequate ventilation was provided, and then two studies were made about that same time. One study was to eliminate the hazards of carbon tetrachloride by diluting it down with fresh air.

At about the same time it was agreed by most of the public health authorities in the field that a concentration [fol. 124] of from 50 to 100 parts per million of carbon tetrachloride was in a safe area.

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Q. With reference to the carbon tetrachloride vapors as compared to air, what is the comparison?

A. $1\frac{1}{2}$ times heavier.

Q. Heavier?

A. Yes, so, if you expose a bottle of carbon tetrachloride, we will say, at a mid-point between the ceiling and the floor, you will find very little concentration in the upper strata, whereas down toward the floor you will have quite an accumulation.

Q. And the weight of the carbon tetrachloride, what is the weight of that?

A. 1.54 comparison to 1 for water.

Q. Therefore it is heavier than air, Doctor?

A. Yes, sir.

Q. And therefore you say it seeks a lower level?

A. Yes.

Q. Now, Doctor, with reference to toxicology, I guess you have told us all about that now?

A. I didn't discuss toxicology.

Q. Will you discuss the toxicology of carbon tetrachloride.

A. The first effect upon inhalation of the substance is that of an anesthetic, that is, it numbs the nerve endings and has a similar effect as you would had you been inhaling chloroform.

So after the inhalation for some time of this, depending upon the concentration in the air, we find that the lungs become saturated and the victim, or the experimental animal, is exhaling carbon tetrachloride as well as inhaling

it. In other words, the lungs are not absorbing it as rapidly as it does the oxygen of the air.

In the lungs going through it goes into the bloodstream and it is carried by the bloodstream into the liver. There metabolates are broken down and it is carried into the [fol. 125] renal system. The sites of injuries, therefore, in carbon tetrachloride poisonings, are in the lungs. We get hemorrhages in the liver, we get a breakdown of the hepatic cells, and in the kidneys, there we get a breakdown of kidney tissue.

Well, poisoning would come under two categories there: acute and chronic. The acute cases would be those wherein they are subjected to one exposure of an extensive amount, and then it is over with; that is, we will say ten minutes to a half hour later, and that is the end of it, and you don't have any more exposures to it, and in those cases you will have the same injuries but very, very slight, because there is no continued reabsorption of your poisonous substance, your carbon tetrachloride, and therefore that heals up very nicely.

But in a chronic, where you have daily or repeated exposure, there we have scar tissue resulting from the previous injuries, newly broken-down tissue, and by some peculiar means they build up a very slight tolerance toward this substance. In other words, an individual who has been exposed to carbon tetrachloride fumes or vapors for one week can stand a greater concentration upon subsequent exposures, and he gradually builds up a concentration that would almost kill instantly on acute exposure. Kill instantly on acute exposure.

Q. Now, Doctor, with reference to exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration, does it have a harmful and deleterious effect upon the human body?

A. Would you mind repeating the first part of the question?

(Question read.)

A. Obviously harmful and deleterious.

[fol. 126] Q. And, Doctor, you have told us that the safe concentration, in your opinion, was up to 100 parts per million?

A. I will say that that is the m.a.e. value today. That means maximum acceptable concentration. These figures, sir, do vary from time to time, but as of today, we will say as of 1956, if I may go back a few days into last year, the maximum acceptable concentration for carbon tetrachloride was 100 parts per million.

Now, there are many states and many compensation laws where the maximum is lower, is down to 75 and 50.

Q. What is your opinion?

A. My opinion on that is that 75 parts per million is much safer. In other words, in a lecture that I had given previously, in that lecture I had said that a concentration of 75 parts per million, in that concentration you can smell the carbon tetrachloride, and when you can smell the carbon tetrachloride, you know that you are about to go beyond your safe limits.

The Court: Why do you use the expression, as you explained it before, 100 parts per million, and 75 parts per million? When you are using that expression, what are you referring to?

The Witness: Weight per unit volume.

The Court: Weight per unit volume?

The Witness: Yes.

The Court: You had not explained that before.

The Witness: Your Honor, I thought I would try to give an analogy there of a grain per gallon of water. In fact, in reporting chemical concentrations in water for public health services we used either grains per gallon or parts per million. In other words, in the English system it is grains per gallon, and in the metric system it goes to per million, which is in terms of liters.

[fol. 127] The Court: That really reflects the concentration of strength, does it not?

The Witness: Yes. It is the concentration of weight per unit volume. That is really what it is. Whether it is a gas or a liquid, that is what it is.

Q. How is that measured? Is there a particular way of measuring that, Doctor?

A. Yes. You simply take a volume, go into atmospheric samples, for example, we take a measured volume of the

atmosphere into a metered container, it is analyzed, and your quantitative results are then translated into this system of parts per million, or milligrams per liter, or grains per gallon.

The Court: As a matter of fact, by excluding the duct system and the rest, is it correct to suggest that the number of parts per million had been decreased?

The Witness: Exactly, your Honor.

The Court: In other words, if you had excluded the various factors to which you referred immediately before we recessed for lunch, you would undoubtedly increase this figure?

The Witness: Exactly, your Honor.

Q. So that if you take into consideration that there are engines in this room of some size, or whatever it is, that would displace some of this room we have described to you, then the PPM would be increased over the 20,000 figure?

A. That's right.

Q. Now Doctor, we have indicated to you that in accordance with the evidence submitted here, and in accordance with the photographs, there was a ventilation system by ducts in the ceiling of this engine room in which air was being brought in to this engine room. What effect would [fol. 128] that have upon the concentration of carbon tetrachloride in that room?

A. That was covered indirectly in my introductory remarks this morning when I spoke about dilution. Introducing air from the upper level would act as a dilution of the air in the room. We had established on many occasions that you would have to bring in 225,000 cubic feet per minute to bring a concentration down to the safe level.

Now, the answer to your question, sir, would be, A, the effect would be that of dilution. Now, how much dilution, I would have to know how much air is being brought in.

Q. Well, what effect would it have upon the concentration of carbon tetrachloride?

A. Very little, sir, because the specific gravity of carbon tetrachloride is 1.54, that is in the liquid state.

Q. How about with reference to air?

A. The air was about five times. To be more exact, 5.3, using air as a standard of one, so you see that it is more than five times heavier than air, so it would sink to the bottom. Your greatest concentration then would be at the floor levels, and as you are venting from the upper strata, near the top of the room, your concentration would be diminished at that point.

Q. What effect would the blowing of air, as far as the concentration of carbon tetrachloride towards the lower part of the room have?

A. The blowing of air would merely act as an agitation to stir it up.

Q. Would it take out the carbon tetrachloride?

A. I question that it would take very little if any.

Q. With reference to an air hose which was placed near this man's face to blow the carbon tetrachloride away from his face, what effect would that have upon the concentration of the carbon tetrachloride?

A. That would act as an agitator. Whether it would have [fol. 129] any effect on the local concentration I question for this reason, because at the height of the man—I don't know how tall this man was but if you have a hose driving air at his head level, say five feet from the floor, that will circulate the air around this man's head and would therefore stir up the air, but the concentration itself would not be changed because he is shifting on one level. If it were directed upward or downward, thereby changing the concentration that way, it would be different, but if you are just blowing it across, you are replacing the air that you are blowing by air that has the same concentration of carbon tetrachloride vapors.

The Court: Well, supposing the fan were blowing the fumes of carbon tetrachloride away from him, you are giving a direction by the use of your hands across his face, and the testimony was that it was blowing it away from him.

The Witness: The fan, your Honor? I thought counsel had indicated that—

Q. Well, as I understand it, there was an air hose blowing it away from his face and also a fan.

A. Well, the fan would stir up and agitate your vapors, and then again I would have to ask, where is this fan?

Q. This fan was located on the floor of the engine room.

A. I should say that it would have very little effect, if any, on the changing of the concentration of the carbon tetrachloride in the room.

Q. Now, in addition to that there were some doors, two doors in the room which were kept open above the level of the floor, and there was an open transom over or on top of one of the doors. What effect would that have upon the concentration of carbon tetrachloride in this room?

[fol. 130] A. Very little carbon tetrachloride vapors would escape from the transom because most of the concentration is at the floor level.

About the doors, I don't see any pictures here of the doors, and I don't know—

Q. Well, they were located about six or eight feet above the floor.

A. That also would have very little effect because your concentration is at your floor level. That is your greatest concentration.

A. To get back to the use of the displacement of carbon tetrachloride, it is one of the best solvents that have been found to be just as efficient and more economical as Stoddard's solvent. Stoddard's solvent is being used, very fine. It has a number of the characteristics that carbon tetrachloride has, but no toxicity. Diethylene chloride is being used. There are quite a number of them. Then a number of these are used where there is no fire hazard to be considered, which is one of the things that made carbon tetrachloride so ideal until its toxic nature was discovered.

Q. And under what particular circumstances, in what areas is the use of carbon tetrachloride unsafe and dangerous?

A. I didn't quite get that.

Q. In what areas; in what particular places and areas is the use of carbon tetrachloride dangerous?

A. Well, the first prerequisite is ventilation, adequate ventilation, and if you conquer that, why, then it is all right. It has been for many years a household preparation.

Q. What about the use of carbon tetrachloride in confined areas? Is that a safe or dangerous practice?

A. In confined areas it is dangerous.

The Court: What do you mean by "confined areas"?

[fol. 131] The Witness: Any room where you do not have ventilation where the vapors, when they do accumulate, will gradually come down to the level of the individual using it so that he can inhale them. In other words, the vapors of carbon tetrachloride cannot and do not escape from the room when it is being used.

Q. What is the proper and effective method of ventilating the room where carbon tetrachloride is used? Where is the location of the ventilation, the type of ventilation?

A. Whereas carbon tetrachloride is heavier than air, at about five plus, three times heavier than air, adequate ventilation, proper ventilation can only be obtained from the lower level or floor level.

Q. And what type of ventilation, should it be air going in or air going out?

A. Exhaust, you want to remove.

Q. Exhaust. And where should that air be located with reference to the room, the location of the room?

A. You mean the duct?

Q. The ceiling.

A. No, the ventilating duct should be at the floor level.

Mr. Baker: At the floor level. Cross-examine.

Cross examination.

By Mr. Mahoney:

The Witness: Your Honor, I don't recall who the publishers are but I can communicate that information to your Honor if you wish me to—

A. (Continuing). — McNally on Toxicology, from Cook County, in that book made that observation in about 1920, [fol. 132] and then the next time it was repeated in the literature was in Brant's Industrial Hygiene.

Now, it so happens, sir, that this is the situation: Today we know that intoxication, alcoholism, impairs the storage of thiamin, vitamin B. Somehow or other carbon tetra-

chloride deprives the liver of its supply of vitamin B. Today we know that.

Five years ago we didn't know that, and studies are being made right along to find out the explanation as to why these things happen. Before this information was known they did say that an alcoholic is predisposed to sensitivity to carbon tetrachloride poisoning, but today we know that it is not because of the alcohol. He may have been deprived of his vitamin B supply by an entirely different thing.

For example, starvation could have caused it, avitaminosis diet, so if he has been deprived of his vitamin B supply and exposed to carbon tetrachloride, he is going to be hit by the effects much quicker and much more severely than an ordinary individual. So you see that it is not a question of alcoholism. I will grant you that when I studied that is what we were taught, but today we know that that is different. Today we know it is due to avitaminosis. Now, this condition can be caused by many factors.

Q. Within your experience, does not this vitamin deficiency generally follow a long period of chronic drinking?

A. We find the vitamin deficiency, sir, more marked during the drinking than after. In other words, it is not a question of whether a man is a chronic drinker or acute drinker, but when your blood level of alcohol is high, say about .20 milligrams per liter, per hundred cc, rather, of blood, why, then your vitamin B deficiency sets in. But [fol. 133] that has no relationship to whether the man is a chronic drinker or an acute drinker.

Q. Well, do I understand you to testify that there is a causal relationship between vitamin deficiency and a predisposition, that there is a causal connection between the vitamin deficiency and excessive drinking, is that right?

A. Yes.

Q. Is the relationship affected by the intensity of the drinking habit?

A. Sir, when you say "intensity," are you referring to how much is being consumed, or length of time involved?

Q. Well, both, Doctor.

Q. Well, both, Doctor.

A. Well, length of time we will rule out because, as I said, it is directly proportional to the alcoholic content of the bloodstream and your alcoholic content of the bloodstream will be high during the drinking process, up to three or four hours after your last drink.

Q. How about the volume?

A. The volume, sir—actually, if you are going to drink more, your alcoholic content of the blood is going to go higher.

Q. Doctor, I ask you to listen to this history contained in the hospital record of decedent, Plaintiff's Exhibit 16:

"Past history reveals that the patient is an alcoholic. He may be drinking one-half pint of whiskey per day for the past five months. Previous to this he drank two quarts of beer per day for ten years."

Now in the light of that history, Doctor, in your opinion was there a predisposition to carbon tetrachloride poisoning in this individual?

A. I don't think the question can be answered that way, sir. The man has been drinking over a period of years, so much whiskey, and that drinking would have caused damage [fol. 134] in the liver, but whether or not—what is more important is whether or not he was drinking on the day he was on the job.

By the Court:

Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation.

A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hypothetical state of facts?

A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that

these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A. If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. [fol. 135] The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instrumental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. Do I answer the question, sir?

Q. When you are talking of the exhaust, do you refer to the high compression blower?

A. That was sucking out.

• • • • •
Redirect examination.

By Mr. Baker:

Q. With reference to this blower, which we brought out was about eight foot above the floor and which was an exhaust—was that so situated and placed as to be effective in the withdrawal and reducing the concentration of carbon tetrachloride fumes in that room?

A. Well, it would be somewhat effective, sir, but the most [fol. 136] efficient place and the proper place for that to be would be at floor level, instead of eight feet high.

Q. So that, considering the location in which this blower was placed, would you say as to whether that is a proper or improper location?

A. I would say that it is an improper location.

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DEPOSITION OF JAMES F. HALEY

Mr. Baker: I would like to read extracts from a deposition of the defendant by its captain, James F. Haley, which was taken on February 11, 1954.

• • • • •
The Court: And this is evidence in the case as if the witness were actually on the stand testifying. Mr. Baker's associate is going to impersonate the witness.

Mr. Baker: Page 3.

“Q. Were you attached to the vessel New Jersey on September 29, 1951 or thereabouts?

A. Yes.

“Q. What was your position with that vessel?

A. I was captain.”

Page 4

“Q. Could you give us generally speaking what your duties were as master of the vessel?

A. Well, my specific purpose was to serve other ships supplying them with pilots and taking pilots off them as they were coming in and leaving New York Harbor.

"Q. Who composed the officers and crew of that vessel in September 1951?

A. Do you want their names?

[fol. 137] "Q. First give me their ranks.

A. We had a first mate, we had a second mate, and possibly on occasions a third mate.

"Q. And the crew, what did the crew consist of? How many were in the crew?

A. The crew consisted of a boatswain and approximately anywhere from seven to ten deck employees including A.B.'s and ordinary seamen.

"Q. How about the engine department?

A. The engine department consisted of the chief engineer, your first and second and third, with a day man and four oilers.

"Q. In September of 1951 were you, as master, as well as the officers and the crew, paid by the United New York & New Jersey Sandy Hook Pilots Association?

A. That is correct."

The top of page 5.

"Q. And you were employed by them?

A. That is correct.

"Q. Do you know where the New Jersey was on September 29, 1951?

A. September 29—that is the date you are talking about, is that it?

"Q. Yes.

A. It was in Rodermond Industries, Inc., Jersey City.

"Q. Do you know where that is located specifically in Jersey City?

A. No, sir.

"Q. Did you bring the vessel over to the Rodermond Industries, Inc. in Jersey City?

A. That is right.

"Q. What was the purpose of bringing it over there, if you know?

A. The annual overhaul, sir."

[fol. 138] Page 6, the middle of the page.

"Q. When you brought it there, was it brought by you and the officers and your complete crew?

A. That is correct, sir, and the Marine Superintendent was aboard, too."

"Q. When you say the marine superintendent, the marine superintendent of what company?

A. Of our organization.

"Q. Of your organization?

A. Yes.

"Q. That is of the United New York and New Jersey Sandy Hook Pilots Association?

A. At that time, yes."

Page 7:

"Q. What is his name?

A. Mr. G. J. Goetz.

"Q. Is he still with your organization, the United New York and New Jersey Sandy Hook Pilots Association?

A. He is an individual pilot.

"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City?

A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel."

Page 8, toward the bottom of the page:

"Q. During that period of time did you remain on board the vessel as the captain of the vessel?

A. Will you be more specific on that question? Remain how long?

"Q. Just tell me what you did in reference to the vessel.

A. We were moored in Rodermond Industries, and I was [fol. 139] on board every day during the working hours."

Page 9:

"Q. And what were the work hours?

A. From 7.30 until anywhere up to 5, 6 or 7 o'clock at night.

"Q. And that was every day while it was at the Rodermond Industries pier?

A. With the exception of week-ends, naturally.

"Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel?

A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.

"Q. Who would do that?

A. That would be the deck department.

"Q. You mean the deck department of the vessel?

A. Of the vessel.

"Q. That has nothing to do with Rodermond Industries?

A. No, sir.

"Q. So that during the time that the vessel was at Rodermond Industries, during that two-week period before and after September 29, 1951, did your entire personnel, officers and crew remain aboard the vessel during the working hours?

A. I will clarify that for you. No. Upon entering the shipyard we went in with a skeleton crew. Therefore our full complement of officers and crew were not aboard.

[fol. 140] "Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection?

A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

"Q. And the engine department?

A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

"Q. I will also ask you to go into the engine department, officers and crew of the engine department.

A. We had the full complement of engineers and engine room crew aboard.

"Q. During that period of time?

A. That is correct.

"Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in Rodermond Industries during that period of time?

A. They were maintaining the engines and any other specific work that we had to take care of.

"Q. Were they also present during the night hours, the engine department?

A. In some cases you would have men sleeping aboard the vessel at night.

"Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours?

A. As a standby or as a watch? What do you mean by that?

"Q. Anyway at all.

A. Well, at night, yes. I will say that there was somebody that represented the engine department aboard the vessel on most of the occasions.

[fol. 141] "Q. I am talking about this particular period while the ship was at the Rodermond Industries.

A. At night they usually slept aboard the vessel at night, that is right.

"Q. You would say they had at least one officer of the engine department, one of the engineers aboard the vessel during the night hours during that period of time?

A. That is true. I would say during the work week, but on week-ends I wouldn't be too sure about it. Some days, some week-ends you would have them. Other week-ends you wouldn't have them.

"Q. With reference to the deck department, during the nighttime, what was done with reference to an officer of the vessel being aboard the vessel?

A. An officer on some occasions would stay aboard the vessel. However, it wasn't compulsory. But at all times we had a fire watch aboard the pilot boat New Jersey during that period that it was in Rodermond's shipyard.

"Q. Would you say that you did also have an officer aboard after the working day, during the night on behalf of the vessel?

A. I would say there was, you are referring to myself, I was the only officer on board. I would say on some particular occasions I did stay on board at night, but on the average it would be possibly maybe two or three nights a week.

"Q. And the officer who would be aboard would be you I understand?

A. That is correct.

"Q. When you weren't there during the evening hours that we described, would you have another officer of the vessel to take your place?

A. No, we just maintained a deck watch; it would be an AB, or one of the deck crew to stand as the watchman more or less as a fire watch."

[fol. 142] Page 13:

The Court: Will you suspend a moment, please, and give this to Mr. Cheney.

(Short pause.)

Mr. Baker: Page 13:

"Q. This deck watch would be someone that you designated?

A. That is correct.

"Q. He would be there after the working day?

A. That is true.

"Q. During that period of time while it was at Rodermond Industries pier, what were the duties of the deck watch as you instructed them?

A. His duties were to stay awake, keep alert at all times inspecting the vessel at various intervals to make sure that there wasn't any pilferage, and also any fire starting in the various sections of the ship.

"Q. Would you say that his duties were the same as your duties would be if you were there during the evening hours?

A. He was representing me."

Page 14, middle:

"Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work; what did you have to do with reference to the vessel while that repair work was going on?

A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries.

[fol. 143] "Q. And that person is Mr. Goetz of the United New York and New Jersey Sandy Hook Pilots Association?

A. That is correct."

Page 15:

"Q. Did you have anything personally to do with working with Mr. Goetz at all times checking the work as you have described it?

A. In some cases he would leave an odd job for me to check, and I would check it to see that it was done in good order and report to him upon completion.

"Q. Am I correct in saying that the odd jobs that you had to check would be some odd job of the Rodermond Industries that was being done aboard the vessel, to see whether it complies with the specification for repairs which they were to do?

A. Well, very seldom I would get a job like that, but in some particular cases we would take care of some small jobs. I never worked with the specs; that was Mr. Goetz's job, and he took care of all that work.

"Q. Did you check all of the work that the Rodermond Industries were doing during that period of time in September or thereabouts of 1951?

A. No, sir.

"Q. Could you tell us what you meant when you said if there was an odd job you would take care of it?

A. Well, like during the day when Mr. Goetz wasn't around, if there was any sand blasting of the hull which they were doing——"

Page 16:

"Q. Who is 'they'?

A. The employees of Rodermond Industries, I would go around and check to see if they were giving us a fair job; [fol. 144] how would you say that, our money's worth, to

see that they were doing the job properly in Mr. Goetz's absence. Then I would go around and make sure that the work was being carried out, being done.

"Q. And if you saw that the work was not being done properly by the employees of Rodermond Industries, what would you do about it?

A. I would report to Mr. Goetz.

"Q. Would this be during that period of time that Rodermond Industries was doing this work in 1951, as you recall?

A. Yes, sir.

"Q. Then during this entire time while Rodermond Industries were doing their work, their repair work, you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel?

A. That is true, yes, sir.

"Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall?

A. If it was necessary they would work on a Saturday or a Sunday.

"Q. Did your deck crew work on September 29, 1951, which was a Saturday?

A. I had one man there.

"Q. Who did you have there?

A. Walter Thompson.

"Q. What was his position?

A. He was to maintain a watch."

Now we will skip to page 27, middle of the page:

"Q. When you returned on Monday did you make a general inspection of the entire vessel?

A. Well, of my entire department I did.

"Q. That is the deck department?

A. That is right.

[fol. 145] "Q. When you made that inspection, just particularly what did you inspect, or generally?

A. To check the general appearance of the vessel, as the watch if anything went wrong, and if there is any work to be done by the watch I check that."

Page 29:

"Q. During the period of time that this vessel was in Rodermond Industries, during that period in September, 1951, if you found any unsafe conditions aboard, for instance some grease on deck, grease or oil on deck or some other unsafe conditions, would it be up to you as the captain of the vessel to see that those conditions were corrected?"

A. Yes, and there was the boss snapper, and if he seen anything that was caused from the result of the negligence of any of his men he would correct it also.

"Q. But the maintenance of the decks was still under your jurisdiction while you were at Rodermond Industries?"

A. Yes.

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction?"

A. Mine and the marine superintendent.

"Q. And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected?"

A. Well, naturally."

Page 30:

"Q. During that week-end of Saturday, September 29, 1951, and Sunday, September 30, 1951, when you left this Mr. Thompson upon the vessel, was his duty the same as your job, if you had stayed aboard the vessel, as the captain of the vessel?"

A. His duties, to explain it in the vernacular, were primarily to act as a fire watch.

"Q. In other words, would you say he took over the job that you would ordinarily do as captain of the vessel? In other words, he took that over during that period?"

A. He represented me in case anybody come looking for me, or he could call up with any situation that might arise of any importance.

"Q. Would you say that he actually took your place aboard the vessel, to do the work that you ordinarily would have done aboard the vessel during that week-end?"

A. I do not see how he could take; you mean as the captain of the boat?

"Q. Well—

A. He helped me. I will put it this way, and if anything like I said before came up he would take care of the situation.

"Q. Was it up to him also to inspect the vessel during that period of time, over that week-end?

A. Naturally he had to go around and watch.

"Q. Make an inspection?

A. When you say inspection, what do you refer to?

"Q. Suppose you tell me.

A. The man was left there primarily for a fire watch, and that was his duty.

"Q. Was it also his duty in general to inspect and watch over the entire vessel during that weekend?

A. His duty was to watch over the vessel.

"Q. Was he to patrol throughout the vessel to see what was going on?

A. Spasmodically at different periods.

"Q. And if any special problems came up with reference to the vessel who would he have to get in contact with [fol. 147] during that week end?

A. He would have to get in touch with myself or the marine superintendent."

I see some cross-examination by Mr. Mahoney on page 32. I will just read a few lines:

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries?

A. For the annual overhaul.

"Q. Just briefly what did that consist of?

A. That consisted of deck and engine work.

"Q. Repairs and overhaul?

A. Repair and overhauls, yes.

"Q. Was that work done under your orders?

A. No, sir.

"Q. To your knowledge was it done under any orders of any of the members of the Pilot Association?

A. Under the orders of the marine superintendent.

"Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications?

A. That is correct."

COLLOQUY

The Court: On this question of control which you just made reference to, do you feel that the Court must disregard the testimony that was just read into evidence as given by the captain of the New Jersey, James F. Haley?

Mr. Mahoney: The defendant contends that that does not establish control.

Under the cases, your Honor, there was a general duty on the part of the association personnel to see that the work was done properly and that the vessel was not damaged [fol. 148] aged, but, as your Honor has held continually throughout our discussions, there was no duty here to warn the decedent, and there is a great deal of testimony, both on the part of Captain Doidge and the witness that you just mentioned, that they had no supervision over the work being done, and they had no authority to direct the manner in which it was done, and, moreover, I think the law is, as cited in our brief, that there is no obligation and no responsibility for the manner in which the work done by a subcontractor is performed, and I respectfully refer you to the series of cases cited in our brief.

The Court: Well, there was direct testimony by Haley that the inspection of the vessel was under his supervision, and also under the supervision of the Marine Superintendent—that is, the Marine Superintendent of the defendant, and that they were to correct conditions, and that this applied to the protection of all men, including those who would be working on the ship as well as crew members.

Of course his statement in and of itself does not establish what the measure of the duty is on the part of the shipowner with respect to invitees working aboard the vessel.

The motion with respect to the negligence claim is denied.

Your other motion was with respect to the claim of unseaworthiness. What is the basis of the motion there?

Mr. Mahoney: As I stated, the defendant's motion to dismiss the claim of unseaworthiness is based on the position that the plaintiff has not established that the defendant [fol. 149] failed in any way to supply reasonable adequate equipment.

The Court: Call your next witness, please. This is the defendant's case. The plaintiff has rested. Now the defendant is going forward with its case.

WALTER C. THOMPSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. By whom are you employed, Mr. Thompson?

A. United New York Sandy Hook Pilots Association.

Q. Will you speak up, please, so everybody can hear you?

A. United New York Sandy Hook Pilots Association.

Q. What is your occupation?

A. At present I am master of a pilot boat, Sandy Hook.

Q. Will you tell us, please, the nature of the Sandy Hook Pilots Association?

A. The nature of the business is to guide ships in and out of New York Harbor.

Q. Did you ever work aboard the Pilot Boat New Jersey?

A. I did.

Q. Is the Pilot Boat New Jersey still owned by the association?

A. It is.

Q. Would you tell us very briefly or describe for us briefly the Pilot Boat New Jersey?

A. She is 448 gross tons. She is on the style of a yacht and she is about 170 feet long.

Q. Were you employed by the association in September 1951?

A. Yes, I was.

[fol. 150] Q. What was your capacity at that time?

A. I was part of the deck crew.

Q. And, do I understand that you were not yet a pilot at that time? Is that correct?

A. That is correct.

Q. Did your duties require you to work aboard the Pilot Boat New Jersey?

A. Yes, it did.

Q. And briefly, what were your duties at that time?

A. Well, at that time I was new in the business. My main job was to do the painting and the cleaning up, and so forth.

Q. You were a deck man, in other words?

A. That's correct.

Q. Where was the Pilot Boat New Jersey on or about September 24, 1951, if you recall?

A. Rodermond Industries, New Jersey.

Q. Were you aboard the boat when it was taken in to Rodermond Industries?

A. Yes, sir, I was.

Q. And to the best of your recollection, was that on or about the 24th of September 1951?

A. Yes, it was around there, somewhere.

Q. Where is Rodermond Industries located?

A. In Jersey City.

Q. Was there a repair yard maintained at that place?

A. I beg your pardon?

Q. I said, was there a repair yard there?

A. Yes.

Q. Did Rodermond maintain a repair yard?

A. Yes.

Q. Where was the Pilot Boat New Jersey tied up at Rodermond?

A. Along the bulkhead.

Q. Was it in the water?

A. Yes, it was.

Q. Do you know approximately how long the boat was at Rodermond Yard?

A. Maybe three weeks, maybe, somewhere around there.

Q. And what was the purpose of the New Jersey being taken to Rodermond at that time?

A. For her annual repairs.

[fol. 151] Q. Tell us briefly what this annual overhaul or the annual repairs consist of.

A. Well, it consists of painting the boat, making minor repairs, changing the lines, working on the engine room, and so forth.

Q. This is done every year, is that right?

A. Yes, sir.

Q. Did you remain at work during the period of time when the boat was at Rodermond's Yard?

A. Yes, sir.

Q. What were your duties during that time?

A. Well, as I said, mostly to do the painting, cleaning up, mostly, on deck. In fact, it was all on deck.

Q. And was the boat in operation during that period?

A. No, sir.

Q. Was there any power supplied by the vessel itself?

A. No, all the power was supplied by shore power.

Q. And how is that power brought aboard the ship, if you know?

A. I know only just with a wire, right to the switchboard.

Q. Well, at any rate, you know it came from the shore, is that right?

A. Yes, sir.

Q. During the period of time between the 24th of September when the boat was brought into the yard and the 29th of September, were there other men working aboard the ship in addition to the ship's crew?

A. Oh, yes, from Rodermond Industries, men worked aboard.

Q. Turning your attention specifically to September 29, 1951, did you have any special duties on that day?

A. No, sir, I was just maintained as a fire watch.

Q. From whom did you receive your orders to work as a fire watch?

A. Well, at that time my orders were from Captain Haley.

Q. What orders did he give you?

A. To stay aboard the boat on Saturdays and maintain [fol. 152] a fire watch and make sure nobody came aboard the boat that wasn't authorized.

Q. What is a fire watch, Mr. Thompson?

A. Well, you just make sure the boat is covered and that there is no fire that breaks out anywhere. That is your main object.

Q. Did you actually work on the morning of September 29th?

A. Yes, I did.

Q. About what time, do you recall?

A. Well, our usual time is 8 o'clock, so it must have been around 8 o'clock.

Q. Was there any other member of the association working with you on that day?

A. No, I was aboard alone on that day.

Q. Was there any other member of the association in the yard or in the vicinity, as far as you know?

A. Not that I can recall, no.

Q. Was the New Jersey a dead ship on that day?

Mr. Baker: I object to the term "a dead ship." This is a conclusion.

The Court: Well, let him describe it.

Q. Did the New Jersey supply its own power on that day?

The Court: You have not answered. You answered it had not?

A. No, it did not.

Q. Did anyone come aboard the ship on the 29th?

A. Yes, there were some men working in the engine room.

Q. Do you know whose these men were?

A. All I know is that they were electricians, to my knowledge, from Rodermond.

[fol. 153] Q. Did you have any conversation with them when they came aboard?

A. Just that they told me they were going to work down in the engine room, that I was going to stay out of the engine room.

Q. Did one of these electricians state to you that you were to stay out of the engine room?

A. Yes, sir. They also told me not to let anybody else down there.

Q. Did you know either of these men by name?

A. No, I can't say I did.

Q. Did you see them aboard the vessel from time to time during the day?

A. Yes, sir, I did.

Q. Did you see them working at any time?

A. Actually working?

Q. Yes.

A. No, I did not.

Q. Were you in the engine room at any time during the day on September 29th?

A. No, sir.

Q. Did you supervise their work in any way, Mr. Thompson?

A. Could I supervise?

Q. Did you supervise the work in any way?

A. Oh, no, sir.

Q. Did you see them assemble the equipment that they worked with?

A. No, I did not.

Q. Did anybody else at all come aboard the ship on that day?

A. Not to my knowledge, no, I don't remember them.

Q. Did either of these men make any complaints to you about anything at all during the day of September 29th?

A. Well, at the end of the day one of the fellows just said he wasn't feeling well.

Q. Did either of these men make any complaints to you concerning the operation of the equipment or anything about the ship itself?

A. No, none at all.

Q. Do you have any knowledge of the nature of the work [fol. 154] that they were doing in the engine room, or did you have any at that time?

A. Only what they told me. Otherwise I had none.

Q. Did you receive any special instructions from any member of the association concerning the work that they were doing?

A. No, none at all.

Q. Were you authorized to give orders to anyone working aboard the ship?

A. No, I was not.

Mr. Mahoney: No further questions.

Cross examination.

By Mr. Baker:

Q. Mr. Thompson, you were part of the deck department, isn't that so?

A. That is correct.

Q. And that is entirely different than the engine department?

A. Yes, it is.

Q. And your superior in the deck department was who?

A. At that time it was Captain Haley.

Q. And he was the one who was your boss?

A. That's right.

Q. Aboard the vessel?

A. Yes, sir.

Q. Is Captain Haley in court here today, this morning?

A. Yes, sir, he was.

Q. Is he here now?

A. No, he is not here right now.

Q. Is he still your boss?

A. No, sir, he is not.

Q. And you took your instructions and your orders from Captain Haley while you worked on the New Jersey, is that right?

A. That is correct.

Q. And he placed you on this vessel on that particular Saturday, is that so?

A. Yes, sir.

Q. That is September 29, 1951, as we know it today?

A. Yes, sir.

Q. And when did he tell you that you were going to be [fol. 155] on the vessel on that Saturday?

A. Probably Friday.

Q. And were you working on the vessel that Friday?

A. Yes, I was aboard the vessel on Friday.

Q. And did you see the chief engineer aboard the vessel that Friday?

A. Yes, apparently he was.

Q. Could you give us his name?

A. The chief is Carl Ebling.

Q. Is he in court?

A. No, sir.

Q. And he was the chief engineer who was in charge of the engine department that day, is that correct?

A. That is correct.

Q. When I say "that day," I mean that entire week or during the entire time that the vessel was at Rodermond Industries?

A. That's right.

Q. Do you know whether he is still employed by this company, the United New York & New Jersey Sandy Hook Pilots Association?

A. Yes, he is.

Q. And did you talk to the chief engineer that Friday? That is the Friday before the Saturday.

A. I probably did. I don't recall exactly.

Q. And did he say anything to you about the work that was going to go on Saturday, the day that you were asked to be aboard the vessel?

A. Not that I can recall, no.

Q. Well, when the captain told you that you were going to work that Saturday, that September 29th, did he tell you what was to take place?

A. To my knowledge, no.

Q. And did you get any instructions from the captain as to what you were to do on that Saturday?

A. To maintain my regular fire watch?

Q. Any other instructions?

A. No, sir.

Q. Any specific instructions?

A. No, sir.

Q. And you have done that before, have you not?

A. Yes, sir, I have.

[fol. 156] Q. And you knew your duties that you were supposed to do?

A. That's right.

Q. What were your duties that particular Saturday?

A. To look around the boat, make sure no one came aboard, make sure there were no fires, or anything like that.

Q. And were you also to patrol around the vessel to see that everything was all right?

A. That's right.

Q. And if you saw any conditions that required any attention, whom would you report it to?

A. I would call either Captain Haley or Mr. Goetz.

Q. And who is Mr. Goetz?

A. At that time he was the Marine Superintendent.

Q. And is he still with the company, the same company?

A. Yes, he is.

Q. He is still the Marine Superintendent?

A. No, he is not the Marine Superintendent any more.

Q. What is he now?

A. He is an individual pilot.

Q. But at that time in September 1951 he was a marine superintendent, employed by the same company you were employed by, the United New York & New Jersey Sandy Hook Association?

A. Yes, sir.

Q. Did you see him on the vessel that particular Friday that you performed this work?

A. I don't recall if I did or not.

Q. And during that Saturday of September 29th, were you on the outside of the engine room?

A. Outside of the engine room?

Q. Did you patrol outside that engine room?

A. Well, I walked around the boat, yes, if that's what you mean.

Q. Your duties did not bring you into the engine room at all?

A. Not at all.

Q. You had nothing to do with the engine room at all?

A. Nothing at all.

[fol. 157] Q. Did you ever, on this particular day, look into the engine room, that September 29th, that Saturday?

A. Not to my knowledge, no.

Q. Did you know the work that was going on?

A. Only what they told me as during the day, during the course of conversation.

Q. And whom did you speak to?

A. The men who were working down there.

Q. And what did they tell you?

A. That they were working on the generators.

Q. And did they tell you what they were using?

A. I believe it was mentioned.

Q. And what did they say?

A. They were using carbon tet.

Q. And did you know at that time it was dangerous?

A. I had an idea.

Q. And you were specifically told to stay out, isn't that so?

A. That is correct.

Q. And to keep other people out?

A. That is right.

Q. These generators in this particular engine room—can you tell us what size they were, approximately?

A. You mean in actual size, or what?

Q. Yes, approximately.

A. Well, the generator itself is maybe about two feet in diameter, three feet. I never looked that close.

Q. That is in diameter—you mean the round part?

A. Yes.

Q. Now the entire engine there—how high (sic) wide and how high, approximately, if you can tell us?

A. The engine? I have no idea. I couldn't tell you.

Q. Well, would you say that these engines and generators occupied 50 per cent of the space in that engine room?

A. In the engine room itself?

[fol. 158] Q. Yes.

A. No.

Q. In the engine room?

A. No, they wouldn't occupy that much space.

Q. How much space would it occupy?

A. The engine is maybe about the size of the desk here, that's all.

Q. Is it a large engine?

A. Fairly large.

Q. How many engines did they have in that room?

A. Counting the mains and everything?

Q. Yes.

A. Four, I guess.

Q. In that same room, the whole room?

A. Yes.

Q. In this photograph marked Exhibit B—what do you call those, transoms, or what name do you give them?

A. We call it the hatch.

Q. What?

A. The overhead hatch.

Q. The overhead hatch?

A. And the skylights.

Q. And those skylights—is that over the upper engine room?

A. Yes, it is.

Q. Not the lower engine room?

A. No, it is what we call over the fiddling, over the upper engine.

Q. In other words, you have a lower engine room and then a stairway leading to the upper engine room?

A. It is just a deck, not an upper engine room there.

Q. These skylights are over the upper engine room?

A. Well, that's right.

Q. Not over the lower engine room?

A. That's right.

Mr. Baker: That's all.

[fol. 159] WILLIAM M. FINKENAUER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. What is your occupation, Mr. Finkenaure?

A. I am a ship's surveyor and consulting engineer.

Q. Are you a licensed marine engineer?

A. No, not seagoing. I am a licensed professional engineer.

MILTON HELPERN called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Cross examination.

By Mr. Baker:

Q. Doctor, with reference to an autopsy, you performed, I know, many, many autopsies, don't you think the person or the doctor who makes the autopsy is in a better position to testify as to what that autopsy disclosed than any other person that would look at a report?

A. Well, I am accepting what the findings were in the autopsy. I don't think there is any disagreement in the autopsy findings as to the cause of death.

The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?

The Witness: Yes, sir.

The Court: I think everybody is in agreement on that. [fol. 160] Is there any question about that?

Mr. Mahoney: The defendant does not take issue with that, your Honor.

Q. I am talking about the individual findings as to the various portions of the body, the liver, for instance.

A. Certainly, the person who saw the liver saw it, and I have to take his language and interpret that. But I am assuming that he saw a liver showing the effects of acute carbon tetrachloride poisoning. I have accepted his findings.

Q. Now, was there from the autopsy report which you have examined any cirrhosis of the liver?

A. No.

Q. No question about that?

A. That's right.

Q. And from the autopsy findings as you examined them was there any evidence of any alcoholism?

A. (No response.)

Q. Is there anything like that in the report?

A. No, there isn't anything in the report that mentions alcoholism. There is no reason why the report would men-

tion that unless it had a positive finding to that effect, but there are many effects of alcohol that are not evident in an autopsy report.

Q. Well, would you be willing then to accept the statement of the man who made the autopsy, assuming he is qualified, rather than a person who just examines the report? Would he be more in a position to know the situation?

A. No, he would be in a better position to describe the color of the organ, but it doesn't necessarily follow that his conclusion is correct. It doesn't follow necessarily, because a man makes observations, that his conclusions are correct.

Q. You are not sure yourself anyway, are you?

A. What do you mean I am not?

Q. You are not sure yourself?

A. No, frankly—

[fol. 161] Q. With respect to alcoholism?

A. Yes, I would not insist on that interpretation, not having seen the liver.

Q. I think you have indicated that there is no question that from examination of this hospital record, marked for identification P-16, that this man sustained his death by reason of carbon tetrachloride poisoning?

A. That's correct, yes.

Q. And by inhalation of carbon tetrachloride poisoning?

A. I think that is a reasonable conclusion, yes.

WILLIAM M. FINKENAUER resumed.

Direct examination.

By Mr. Mahoney (resumed):

Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room?

A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaar?

A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air.

Mr. Mahoney: The defendant at this time renews the motion for a directed verdict on the ground that there has been a complete failure of proof in establishing either that the defendant showed lack of care in any regard in [fol. 162] so far as the negligence cause of action is concerned, and, moreover, that there has been no testimony based on factual evidence that the defendant failed to supply the decedent with a safe place in which to work.

The Court: If anything, the case, in my opinion, is in the posture now so that it is much stronger than it was at the close of the plaintiff's case. You have had your own expert testify that the ventilating system of the ship was not adequate to remove carbon tetrachloride. I think this must be taken into account together with the fact that the shipowner in this case designated and specified carbon tetrachloride as the substance to be used in cleaning the generators.

Mr. Mahoney: Your Honor, in view of the line of cases which provide that the defendant is required to supply only equipment reasonably suited for the purpose for which it was designed, the defendant submits that it would be extremely unreasonable and not within the intention of the line of cases on unseaworthiness to require the defendant to supply a ventilation system adequate to remove every conceivable substance that might be used in that compartment. Specifically, carbon tetrachloride being a substance heavier than air, and not a substance designed for general use in a compartment of this type, the defendant submits that there was no obligation on its part to do more than supply reasonably adequate equipment, and that the decedent and his employer brought aboard the vessel additional devices with the knowledge that no ventila-

tion system aboard the vessel was adequate to remove that substance.

[fol. 162A] The Court: Your statement up to the last moment was all right as far as it went. In other words, you are recognizing that the ventilating system of the ship was inadequate to remove carbon tetrachloride, and I am sure that there is no point to argue or disagree with you that a ship perhaps ordinarily is not required to have a ventilating system that could remove a poison of that type which is rarely used. The moment that you specify carbon tetrachloride as the chemical to be used in cleaning the generator, and it was known that it was a dangerous substance, then there was a duty certainly to see that the ventilating system was supplemented and aided by other methods of withdrawing the fumes, and that presents the basic question in the case, it seems to me. Whether the ventilating system both that which was part of the ship regularly and that which was brought in as auxiliary equipment constituted a sufficiently adequate system in order that the men might work there with reasonable safety.

I hold there is a question of fact for the jury to pass upon. Your motion is denied.

[fol. 162B]

ABSTRACT FROM EXHIBIT P-5

RODERMOND INDUSTRIES INC.

Foot of Henderson Street,
Jersey City, N. J.

Sept. 24th, 1951

W. O. #4190

Pilot Boat "NEW JERSEY"

Yard

a/c N. Y. & N.J. Pilots Association

24 State St., N.Y.C.

LIST OF REPAIRS

ITEM

1 Furnished necessary Drydocking to complete under-water work. Shifted all bilge blocks and painted the bare spots with two (2) coats of apexior paint.

2 PORT & STBD GENERATORS

Crew to remove and replace the 8 cylinder heads for the port and stbd. generators.

Contractor to remove the eight (8) heads to the shop, disassemble same, grind in the valves, thoroughly clean out the heads, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.

Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order.

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[fol. 163]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

Argued November 21, 1957

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased, Appellee,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation, Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District
Court for the Southern District of New York in favor of the
plaintiff in an action to recover damages for the death of
the decedent in the State of New Jersey because of the
negligence of the defendants and of the unseaworthiness of
a pilot boat on which he was employed. Affirmed.

[fol. 164]

OPINION—Decided January 10, 1958

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered
on the verdict of a jury, awarding damages for the death

of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," [fol. 165] but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus,

means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.¹ The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit [fol. 166] place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,² but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let,

¹ *United States v. Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker v. Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge v. Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

² *Leathers v. Blessing*, 105 U. S. 626, 630.

or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities." ³ Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,⁴ rightly [fol. 167] or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel within the navigable waters of New Jersey. In *Guerrini v. United States*, 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot v. Hawk*, 346 U. S. 406 or *Petterson v. Alaska S.S. Co.*, 347 U. S. 396, was decided: it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawk*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no

³ Restatement of Torts, Vol. II, §344, Comment b.

⁴ "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawk, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read v. United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in [fol. 168] *Berryhill v. Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge v. National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two^o other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren v. United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey which provides in general terms: "When the death

^o N. J. S. A. 2A:31-1.

of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action [fol. 169] for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard v. The Tungus*, December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham v. Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee v. Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: i.e., whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot v. Hawn*, *supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, [fol. 170] no matter where suit upon it was brought.* In

* *Robinson v. Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette v. Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien*

Pope & Talbot v. Hawn, *supra*, however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.⁷ The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, [fol. 171] the First Circuit in *O'Leary v. United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with *Pope & Talbot v. Hawn*, *supra*, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence

v. Luckenbach S.S. Co., 293 F. 170 (2d Cir. 1923); *Klingseisen v. Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham v. A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee*, 300 F. 93 (S. D. N. Y. 1924).

⁷ *Cf. Garrett v. Moore-McCormick Co.*, 317 U. S. 239.

of death." We are aware that *Curtis v. Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary v. United States Lines Company*, *supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, Circuit Judge (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in [fol. 172] spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City,

New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

"Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer [fol. 173] that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of

the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping v. Sieracki*, 328 U. S. [fol. 174] 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.¹ From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

¹ See Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381 (1954); *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, *The Law of Admiralty*, 315-324, 358 (1957).

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping v. Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may [fol. 175] be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He

was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they [fol. 176] do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki*, *Hawn* and *Petterson*² cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are en-

² *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953); *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

titled to a warranty of seaworthiness. This assimilates [fol. 177] spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge v. National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence. There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis v. Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expect-

ing the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis v. Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy v. Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), *aff'd* 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to [fol. 179] Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

[fol. 180]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Carroll C. Hincks,
Hon. J. Edward Lumbard, Circuit Judges.

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, Plaintiff-Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, et al., Defendants-Appellants.

JUDGMENT—January 10, 1958

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of
record from the United States District Court for the
Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered,
adjudged, and decreed that the judgment of said District
Court be and it hereby is affirmed; with costs to the ap-
pellee.

A. Daniel Fusaro, Clerk

[fol. 181]

[File endorsement omitted]

[fol. 182] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94—October Term, 1957

Docket No. 24551

[Title omitted]

PETITION FOR RE-HEARING—Filed January 24, 1958

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[fol. 185]

PETITION FOR RE-HEARING—Filed January 24, 1958

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association, appellants, respectfully pray for a re-hearing and re-argument of this case for the reasons cited below.

With the filing of this petition appellants are also filing a petition praying that this petition for re-hearing be heard and considered in banc by all the judges of this Court who are in active service.

Statement

This is an appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action brought pursuant to the New Jersey Wrongful Death Statute, for the death of the decedent, because of the negligence of the defendants and of the unseaworthiness of the vessel on which he was working.

The appeal was argued before Circuit Judges Hand, Hincks and Lumbard, and was affirmed in an opinion by Circuit Judge Hand, with a dissenting opinion by Circuit Judge Lumbard.

Reasons for Granting This Petition

Point I

The majority erred in applying comparative negligence to an action brought under a State Death Statute.

The opinion of the majority agreed that the contributory negligence of a decedent had been an absolute defense to an action brought under a Lord Campbell's Act, but held that this Rule had been changed by *Pope & Talbot v. Hawn*, 346 U. S. 396 (1953).

This decision, which was the sole authority cited for the fundamental change, held that an action to enforce a right rooted in Federal Maritime Law must be controlled by the Admiralty Rule of Comparative Negligence. The petitioner respectfully contends that the Rule of the *Hawn* case, involving an injured shore worker, has no application to this suit, brought by an administratrix, for wrongful death.

The Supreme Court in *Hawn* rejected the State Rule of contributory negligence, because the plaintiff's right to sue for unseaworthiness and negligence was rooted in Federal Maritime Law. *The plaintiff in this action, suing under the New Jersey Wrongful Death Statute was not [fol. 187] seeking to enforce a right rooted in Maritime Law, as no cause of action for wrongful death exists in Maritime Law.*

The misapplication of the *Hawn* Rule is made apparent by the following language from the *Hawn* opinion, which was relied upon by the majority in *Halecki*.

"The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even if *Hawn* were seeking to enforce a State created remedy for this right, Federal Maritime Law would be controlling. . . ." pages 409-410

There is no question that the "right" which *Hawn* was seeking to enforce was a Maritime right which should be controlled by the Admiralty Rule of Comparative Negligence. The "right" which the administratrix is seeking to enforce in the instant case is one which does not exist under Maritime law, but is rooted firmly in State law.

The petitioner respectfully submits that a radical departure from the position taken by other Circuits, which have applied the Rule of contributory negligence to suits under Lord Campbell's Acts should be based only upon firm legal precedents.

Point II

The majority's conclusion was contrary to the position of the United States Supreme Court.

The petitioner respectfully disagrees with the majority's statement that it was free to disregard the State Rule of contributory negligence. The Supreme Court has emphasized that Federal Courts should not infringe upon substantive rights created by the States, and that there is a clear distinction between rights rooted in the General Maritime Law, and rights based on State law. [fol. 188]. The majority has referred to *Garrett v. Moore McCormack Co.*, 317 U. S. 239 (1942), in concluding that the Rule of Comparative Negligence should be applied. However, the language of Mr. Justice Black, who delivered the majority opinion in *Garrett, supra*, demonstrated that substantive rights rooted in State Law are to be protected as zealously as those originating in Maritime Law. He stated at page 245:

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the Federal Courts of rights created or governed by State law. (*Erie R. Co. v. Tompkins*, 304 U. S. 64). And Admiralty Courts, when invoked to protect rights rooted in State law, endeavor to determine the issues in accordance with the substantive law of the State."

The *Garrett* opinion referred to *Erie R. Co. v. Tompkins, supra*, as did *Pope & Talbot v. Hawn, supra*. Here, it was cited for the proposition that Federal District Diversity Courts must try State created causes of action

in accordance with State laws. These references to the decision which outlined the relationship between State and Federal law, discloses the importance placed by the Supreme Court of the United States upon substantive rights given by State law. As far back as *The Harrisburg*, 119 U. S. 199 (1886), the Supreme Court held that a Federal Court, applying a State remedy, must apply it subject to the limitations of State law. This principle was affirmed in *Levinson v. Deupree*, 345 U. S. 648 (1953).

[fol. 189]

Point III

The majority misinterpreted the work done by the decedent.

Petitioner contends that the majority misunderstood the nature of the work performed by Halecki, and that the warranty of seaworthiness was erroneously extended. The opinion characterized the decedent's work as "cleaning the ship", although the record discloses that the decedent was a qualified electrician, an employee of a sub-contractor, engaged to perform specialized work aboard the ship while it was out of operation.

The "ship's cleaners" to whom the warranty was extended in other cases were men whose duties were to clean the ship in preparation for the reception of cargo. As pointed out by the dissenting opinion of Judge Lumbard, this misconception renders the Halecki decision inconsistent with the position taken by this and other Circuits.

Point IV

The majority erred in its interpretation of the New Jersey Wrongful Death Statute.

In addition to rejecting the firmly established New Jersey Rule of contributory negligence, the majority held that the New Jersey Lord Campbell's Act, *New Jersey Statutes Annotated*, 2A:31-1 (1937) was broad enough to encompass a death action based upon unseaworthiness. The majority of this Court thereby attributed to the New Jersey Legislature an intent to create a remedy to enforce a right which did not exist at the time the Statute was enacted.

The decision of the Supreme Court in *Sieracki v. Seas Shipping Company*, 328 U. S. 85 (1946), for the first time extended to a non-seaman the right to sue for unseaworthiness. [fol. 190] The New Jersey Death Statute, although of early origin, was enacted in its present form in 1937, at a time before the *Sieracki* decision, when the legislature could not possibly anticipate a death action by a shore worker, based upon a breach of warranty for unseaworthiness.

Point V

The majority erred in upholding the sufficiency of the evidence.

The majority disposed of that portion of the appeal which was based on insufficiency, by stating that the competence of the plaintiff's expert witness was within the discretion of the Trial Court. The cases cited for this holding involved instances where the qualifications of the experts had been questioned.

The petitioner respectfully submits that the majority misinterpreted this phase of the appeal, as the qualifications or competency of the expert witness were not questioned. The appellant contended that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself.

The appellant's brief and argument were directed towards the insufficiency of the evidence, and not toward the competency of the witness.

Respectfully submitted,

United New York and New Jersey Sandy Hook
Pilots Association and United New York Sandy
Hook Pilots Association.

By Dougherty, Ryan & Mahoney, Attorneys for Ap-
pellants.

Dated: New York, New York
January 23, 1958.

[fol. 191] I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded, and that it is not made for the purpose of delay.

Lawrence J. Mahoney

[fol. 192] Petition denied.

LH, CCH, C.JJ.

I dissent.

J.E.L., C.J.

January 29, 1958

[fol. 193] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94

October Term, 1957

Docket No. 24551

[Title omitted]

PETITION FOR HEARING IN BANC—Filed January 24, 1958

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[fol. 195] PETITION FOR HEARING IN BANC—
 Filed January 24, 1958

*To the Honorable the Judges of the United States Court
 of Appeals for the Second Circuit Who Are in Active
 Service:*

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association, appellants, have filed a petition for re-hearing, and in this petition, addressed to all the Judges of this Court who are in active service, prays that this appeal be heard and determined in banc.

[fol. 196] Statement

This is an appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action brought pursuant to the New Jersey Wrongful Death Statute, for the death of the decedent, because of the negligence of the defendants and of the unseaworthiness of the vessel on which he was working.

The appeal was argued before Circuit Judges Hand, Hincks and Lumbard, and was affirmed in an opinion by Circuit Judge Hand, with a dissenting opinion by Circuit Judge Lumbard.

The majority opinion held the following:

1. The sufficiency of the evidence was within the discretion of the Trial Court.
2. The nature of the decedent's work entitled him to the warranty of seaworthiness.
3. The New Jersey Wrongful Death Act encompasses an action for unseaworthiness.
4. An action brought for negligence under the New Jersey Wrongful Death Statute, by the administratrix of a decedent fatally injured aboard ship, must be controlled by the Admiralty Rule of Comparative Negligence.

Reasons for Granting This Petition

In the petition for a re-hearing, reference was made to several material errors which petitioner respectfully contends were contained in the majority's opinion. The petitioner believes that a brief review of the facts and the opinion will demonstrate that the issues are of extreme importance.

[fol. 197] The application of the Rule of Comparative Negligence to an action under a State Death Statute is a radical departure from the position taken by other authorities, and should be based only on firm principles.

The sole authority cited by the majority for this departure was *Pope & Talbot v. Hawk*, 346 U. S. 406 (1953), which, as appears in the petition for a re-hearing, involved an entirely different cause of action.

Moreover, the re-hearing has been requested on the ground that the majority opinion conflicts sharply with the Supreme Court's firmly established position with regard to the protection of substantive State law. Petitioner respectfully contends that erroneous application of comparative negligence is a violation of the principle that Federal Courts must try State created causes of action in accordance with State laws.

The majority was in conflict with decisions of this and other Circuits when it held that the nature of the decedent's work entitled him to the warranty of seaworthiness. As pointed out by the strong dissenting opinion of Circuit Judge Lumbard, this holding was in conflict with *Berge v. National Bulk Carriers Inc.*, which was decided by the same panel on the same day. Petitioner has argued in the petition for re-hearing that the majority has misconceived the nature of the work done by the decedent.

A question also exists concerning the extent to which a Federal Court can interpret the intent of a State legislature. This issue arises because the majority has decided that the Wrongful Death Statute of New Jersey is broad enough to encompass a claim based on unseaworthiness. The petition for a re-hearing has pointed out that the Statute in question was enacted before the decision of *Sieracki v. Seas Shipping*, 328 U. S. 85 (1946), which first held that a shore worker had a right to the warranty of seaworthiness.

[fol. 198] Wherefore, petitioner respectfully prays that the appeal be heard and determined in banc by all of the Judges of this Court who are in active service.

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association.

Dougherty, Ryan & Mahoney, By Lawrence J. Mahoney, Attorneys for Appellants.

Dated: New York, New York
January 23, 1958.

[fol. 199] [File endorsement omitted]

The within petition for rehearing in banc having been referred to all active judges of the Court at Judge Lumbard's request, it is ordered that the petition be denied, Judge Lumbard dissenting.

s/ Carroll C. Hincks, U.S.D.J.

February 20, 1958

[fol. 200]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Carroll C. Hincks,
Hon. J. Edwar (sic) Lumbard, Circuit Judges.

[Title^o omitted]

ORDER DENYING PETITION FOR REHEARING—
Filed January 31, 1958

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 201] [File endorsement omitted]

[fol. 202]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Harold R. Medina, Hon. Carroll C. Hincks, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING EN BANC—
Filed February 20 1958

A petition for a rehearing en banc having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 203] [File endorsement omitted]

[fol. 204] Clerk's Certificate to foregoing transcript, omitted in printing.

[fol. 205] SUPREME COURT OF THE UNITED STATES

No. 955—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 322.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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APR 23 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. ~~935~~ 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

LAWRENCE J. MAHONEY

Counsel for Petitioners

67 Wall Street

New York 5, N. Y.